APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1967

No. 465

ELISHA EDWARDS,
PETITIONER

vs.

PACIFIC FRUIT EXPRESS COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 7, 1967
CERTIORARI GRANTED OCTOBER 23, 1967

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Appendix

District Court of the United States for the Southern Division of the Northern District of California

No. 44,413

Elisha Edwards, Plaintiff,

vs.

Pacific Fruit Express Company, a Utah Corporation, Defendant.

COMPLAINT FOR DAMAGES (FELA)

Plaintiff complains of defendant and for cause of action alleges:

I

That at all times herein referred to, the defendant PACIFIC FRUIT EXPRESS COMPANY was and still is a corporation incorporated under and existing pursuant to the laws of the State of Utah and was, and still is, a common carrier by Railroad within the meaning of Title 45 USC 51 engaged in interstate commerce between the several states.

II

That on or about the 9th day of November, 1963, the plaintiff herein was an employee of said PACIFIC FRUIT EXPRESS COMPANY engaged in work in furtherance of defendant's railroad operations in interstate commerce.

III

That on or about the 9th day of November, 1963, plaintiff was operating a certain motor vehicle on the premises of the defendant in the City of Roseville, County of Placer, California. That plaintiff was operating said motor vehicle at the direction of said defendant in the course and scope of his employment. That said motor vehicle was owned and maintained by said defendant and was furnished by said defendant for the use of the plaintiff in the course of plaintiff's employment with defendant. That said motor vehicle was so poorly and negligently maintained by said defendant that it was in an unsafe and dangerous condition at the time and place mentioned above. That as a proximate result of said poor and negligent maintenance, the said vehicle failed in its normal use and plaintiff was precipitated violently to the ground, covered with burning gasoline, causing the injuries and damage hereinafter described.

IV

That at all times herein mentioned, defendant failed to provide plaintiff with a safe place to work and

failed to provide plaintiff with safe appliances with which to work. That said failure to provide a safe place to work and safe appliances with which to work proximately caused the injuries described hereinafter.

V

That defendant was negligent in its care, operation and maintenance of its yards, facilities, tracks, vehicles, equipment, appliances and properties at its location in said City of Roseville. That defendant failed adequately to oversee, manage, control and supervise the job which plaintiff was assigned and engaged in doing. That defendant failed to furnish sufficient, adequate and proper equipment for the performance of the job to which plaintiff was assigned. These acts and omissions all proximately contributed to the injuries which plaintiff was caused to suffer.

VI

As a proximate result of the acts and omissions complained of hereinbefore, the plaintiff was hurt and injured in his health, strength and activity, sustaining injury to his body and shock and injury to his nervous system and person, all of which said injuries have caused and continued to cause plaintiff great mental, physical and nervous pain and suffering. Plaintiff also is informed and believes that said injuries will result in permanent disability and disfigurement as well as pain and suffering in the future, all to his damage in the sum of ONE MILLION DOLLARS ($1,000,000.00).

VII

That by reason of said injuries, sustained as aforesaid, it was necessary for plaintiff to engage the services of physicians, surgeons and hospitals; that plaintiff does not now know the reasonable value of said services to be obtained or to be reasonably required in the future.

VIII

As a further proximate result of said negligence of the defendant, plaintiff was prevented from attending to his usual occupation, and plaintiff is informed and believes that he will thereby be prevented from attending to said usual occupation for an indefinite period in the future.

WHEREFORE, plaintiff prays judgment for special damages according to proof and for general damages in the sum of ONE MILLION DOLLARS ($1,000,000.00) and for the cost of this suit and such other relief as the court shall deem proper.

Jack H. Werchick
Attorney for Plaintiff.

[Title of Court and Cause]

ANSWER TO COMPLAINT

Comes now defendant Pacific Fruit Express Company, a corporation, and in answer to the complaint herein, admits, denies, alleges, and avers as follows:

I.

Answering paragraph I of plaintiff's Complaint, defendant Pacific Fruit Express Company admits

that at all times herein referred to, the defendant Pacific Fruit Express Company was and still is a corporation incorporated under and existing pursuant to the laws of the State of Utah.

II.

Answering paragraph II of plaintiff's complaint, defendant admits that on or about the 9th day of November, 1963, the plaintiff herein was an employee of said Pacific Fruit Express Company.

III.

Answering paragraph VII of plaintiff's Complaint, defendant admits the allegations therein contained.

IV.

Denies generally and specifically each and every allegation contained in plaintiff's Complaint not expressly admitted to be and, without limiting the foregoing, this defendant denies that it was guilty of any negligence, either as alleged in plaintiff's Complaint, or otherwise, or at all, and further, without limiting the foregoing, denies plaintiff was damaged in the sum alleged in the Complaint, or in any other amount, or at all.

For A Second, Separate, and Distinct Answer and Affirmative Defense, This Defendant Alleges That:

The plaintiff Elisha Edwards did not exercise ordinary care, caution or prudence in the premises to avoid said accident and for his own safety and the

accident and resultant injuries, if any, sustained by said plaintiff, were proximately contributed to and caused by the failure of said plaintiff to exercise ordinary care, caution or prudence in the premises to avoid said accident and for his own safety in the premises.

For A Third, Separate, and Distinct Answer and Affirmative Defense, This Defendant Alleges That:

The Complaint fails to state a claim against defendant upon which relief can be granted.

For A Fourth, Separate, and Distinct Answer and Affirmative Defense, This Defendant Alleges That:

The Court lacks jurisdiction over the subject matter of the action.

For A Fifth, Separate, and Distinct Answer and Affirmative Defense, This Defendant Alleges That:

The right of action set forth in the Complaint did not accrue within one year before the commencement of this action.

For A Sixth, Separate, and Distinct Answer and Affirmative Defense, This Defendant Alleges That:

Defendant is an employer within the provisions of Sections 3201 et seq. of the Labor Code of the State of California, and plaintiff's sole and exclusive

remedy is under said provisions and before the Industrial Accident Commission of the State of California. Pursuant to said laws defendant has paid the sum of $6,436.10 in temporary disability benefits and has furnished medical care and hospitalization.

For A Seventh, Separate, and Distinct Answer and Affirmative Defense, This Defendant Alleges That:

There is pending in the Superior Court in and for the City and County of San Francisco bearing action No. 548977, filed November 6, 1964, another action for personal injuries based on the same events set forth in plaintiff's Complaint.

Wherefore, defendant Pacific Fruit Express Company prays judgment that plaintiff Elisha Edwards take nothing by his Complaint, but that defendant have judgment for its costs of suit against said plaintiff and for such other relief as may be by the Court deemed proper.

Dated: January 7, 1966.

Corrigan and Roy
/s/ Donald Roy
Attorney for Defendant
Pacific Fruit Express Company

[Title of Court and Cause]

NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT IN FAVOR OF DEFENDANT

Please Take Notice that on Monday, the 7th day of February, 1966, at 10:00 A.M., or as soon thereafter as counsel can be heard, in the courtroom of the Court hearing the Law and Motion calendar, at the United States District Court House, 450 Golden Gate Avenue, San Francisco, the defendant Pacific Fruit Express Company will move the Court as follows:

For an order dismissing the complaint and for entry of summary judgment in favor of defendant and against plaintiff as prayed in the answer on file.

This motion is based on this notice, the pleadings, records, and files herein; on the affidavit of W. G. Cranmer, attached hereto as Exhibit B, the statement of reasons and memorandum of points and authorities in support of this motion, and the proposed summary judgment filed herewith.

Dated: January 19, 1966.

Corrigan and Roy
/s/ Donald Roy
Attorney for Defendant
Pacific Fruit Express Company

[Title of Court and Cause]

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

I

PRELIMINARY STATEMENT

This motion for summary judgment by defendant Pacific Fruit Express Company hereafter called PFE, is taken on the ground that PFE is not a common carrier by railroad under the Federal Employers' Liability Act, 45 U.S.C. Sections 51 et seq. According to the allegations of paragraph II of the Complaint and the Affidavit of W. G. Cranmer, pages 4 and 5, at all times pertinent hereto plaintiff was employed by PFE as an iceman. Plaintiff's Complaint sounds under the Federal Employers' Liability Act.

II

PFE IS NOT A COMMON CARRIER

The courts have been unanimous in holding that refrigerator car companies are not common carriers by railroad under the Federal Employers' Liability Act, and three of these cases have so held as to Pacific Fruit Express Company.

A recent authority is *Aguirre v. Southern Pacific Company, et al.*, 232 ACA 777 (March 1965). That case dealt with precisely the same problem and the same defendant. Judge Sheehy of the Superior Court for the County of Sacramento granted a summary

judgment and the matter was appealed to the District Court of Appeal which affirmed. A hearing has not been granted in the California Supreme Court. The District Court of Appeal held that since PFE does not operate as a common carrier by rail its employees do not come under the Federal Employers' Liability Act. The court further held that ownership of PFE by Southern Pacific and Union Pacific does not make PFE employees the employees of the railroads. Further, the mere fact an employee of a refrigerator company works on or near railroad cars does not convert his employer to a railroad or a railroad to his employer. *Aguirre* is in point and a copy of the District Court of Appeal opinion is attached hereto as Exhibit "A."

In *Gaulden v. Southern Pacific Company,* 78 F. Supp. 651 (N.D. Calif. 1948), *aff'd* 174 F. 2d 1022 (9th Cir. 1949); Judge Goodman held adversely to the plaintiff who raised the same contentions as are made by plaintiff in the instant case. Gaulden was employed as an iceman in the icing yard and plant owned and operated by PFE at Bakersfield, California. He was injured while aiding in the moving of an empty car from a loading platform. The Court's opinion states:

> " . . . Pacific Fruit Express Company neither moves nor controls the movement of 'reefers' to and from or beyond its icing docks and plants. Such movements are handled by rail common carriers, principally Southern Pacific Company or Union Pacific Railroad Company. This was

true in the case of the cars being unloaded when plaintiff was injured. Pacific Fruit Express Company possesses no rail motive power, except one plant locomotive used for shop switching purposes. The only railroad tracks owned by Pacific Fruit Express Company are shop tracks and unloading tracks. The former are used only in the operation of its car shops. The latter are used only for deliveries of ice to Pacific Fruit Express Company for use in its icing service. The only movement of reefers by Pacific Fruit Express Company are at its own shops and plants, on and along these tracks. These movements are incidental to the repair and rebuilding of reefers in the Pacific Fruit Express Company shops and the servicing of reefers at the Pacific Fruit Express Company ice plants." (pp. 653-54)

In holding that PFE is not a common carrier by railroad hence not within the Federal Employers' Liability Act, the court said:

"Plaintiff contends that the Pacific Fruit Express Company is a common carrier by railroad and hence within the reach of the Federal Employers' Liability Act. The Court holds to the contrary. The act itself subjects freight common carriers by railroad, while engaging in commerce between any of the several states or territories, to liability in damages to any person suffering injury while employed by such carrier in such commerce. 45 U.S.C.A. §51. There does not seem to be any doubt at all that the business of renting refrigerator cars to railroads or shippers and providing protective service in the transportation of perishable commodities is not of itself that of

a common carrier by railroad. *Ellis v. Interstate Commerce Commissioner,* 237 U.S. 434, 35 S.Ct. 646, 59 L.Ed. 1036; *United States v. Fruit Growers Express Co.,* 279 U.S. 363, 49 S.Ct. 374, 73 L.Ed. 739; *Wells Fargo & Co. v. Taylor,* 254 U.S. 175, 41 S.Ct. 93, 65 L.Ed. 205; *United States ex rel. Chicago Refrigerator Company v. Interstate Commerce Com.,* 265 U.S. 292, 44 S.Ct. 558, 68 L.Ed. 1024; *Reynolds v. Addison Miller Co.,* 143 Wash. 271, 255 P. 110.

"The Federal Employers' Liability Act was amended in 1939. At that time, despite earlier decisions, some of which have been cited, no effort was made to include refrigerator companies within its terms. Congressional inactivity in that regard must be given its usual implication, i.e acquiescence in the judicial rulings. Federal legislation concerning the social security of employees employed in Interstate Commerce specially included employees of Refrigerator Companies within the meaning of the term carrier, thus indicating Congressional awareness of the actualities. Thus the terms of the statute, plus the judicial interpretations of its meaning and the obvious knowledge of the Congress over a long period of time as to such judicial pronouncements, make it abundantly clear that Pacific Fruit Express Company itself is not a common carrier by rail and not subject to the provisions of the Act." (pp. 654-55)

The Supreme Court of Utah has also held that PFE is not a common carrier by railroad. In *Moleton v. Union Pac. R. R.,* 219 P.2d 1080 (Utah 1950), *cert.*

denied, 340 U. S. 932, a judgment of non-suit dismissing plaintiff's action under the Federal Employers' Liability Act was affirmed. Plaintiff was an ice man employed to descend into bunkers on refrigerator cars to regulate heaters which generate carbon monoxide gas. He was injured while performing this duty in the Union Pacific yards at Laramie, Wyoming. As in *Gaulden, supra,* the court held that the supply of refrigerator cars and protective services to railroads by PFE was not enough to make it a common carrier by railroad.

An unbroken line of United States Supreme Court decisions has conclusively settled that refrigerator car companies or companies supplying protective services to railroads, whether railroad owned or not, are not common carriers by railroad for any purpose, whether under the Federal Employers' Liability Act or under the Interstate Commerce Act. Thus, in *Ellis v. Interstate Commerce Comm'n,* 237 U. S. 434 (1914), it was held that Armour Car Lines, which owned refrigerator cars and rented them to railroads, and operated icing stations on lines of various railroads, was not a common carrier. At pages 443-44, the court said:

> "It has no control over motive power or over the movement of the cars that it furnishes as above; and in short, notwithstanding some argument to the contrary, is not a common carrier subject to the act. It is true that the definition of transportation is §1 of the act includes such instrumentalities as the Armour Car Lines lets

to the railroads. But the definition is a preliminary to a requirement that the carriers shall furnish them upon reasonable request, not that the owners and builders shall be regarded as carriers, contrary to the truth. The control of the Commission over private cars, &c., is to be effected by its control over the railroads that are subject to the act."

Wells Fargo & Co. v. Taylor, 254 U. S. 175 (1920), held that an employee of a common carrier by express who was injured in the derailment of an express car in which he was working, which was part of a railroad passenger train, was not entitled to recover under the Federal Employers' Liability Act. It was held that the express company was not a common carrier by railroad. The remarks of the court on page 187 are particularly significant:

"In our opinion the words 'common carrier by railroad,' as used in the act, mean one who operates a railroad as a means of carrying for the public,—that is to say, a railroad company acting as a common carrier. This view not only is in accord with the ordinary acceptation of the words, but is enforced by the mention of cars, engines, track, roadbed and other property pertaining to a going railroad (see *Southern Pacific Co. v. Jensen,* 244 U.S. 205, 212-213); by the obvious reference in the latter part of ##3 and 4 to statutes requiring engines and cars to be equipped with automatic couplers, standard drawbars and other appliances intended to promote the safety of railroad employees (see *San Antonio & Aransas Pass Ry. Co. v. Wagner,* 241 U. S. 476,

484); by the use of similar words in closely related acts which apply only to carriers operating railroads, c. 196, 27 Stat. 531; c. 225, 35 Stat. 476; c. 208, 36 Stat. 350, and by the fact that similar words in the original Interstate Commerce Act had been construed as including carriers operating railroads but not express companies doing business as here shown. 1 I.C.C. 349; *United States v. Morsman,* 42 Fed. Rep. 448; *Southern Indiana Express Co. v. United States Express Co.,* 88 Fed. Rep. 659, 662; s.c. 92 Fed. Rep. 1022. And see *American Express Co. v. United States,* 212 U. S. 522, 531, 534.

"As Taylor was not an employee of the railroad company and the express company was not within the Employers' Liability Act, it follows that the act has no bearing on the liability of either company or on the validity of the messenger's agreement."

Fruit Growers Express Company, which is owned by a number of railroads, is engaged in the same type of business as PFE, the renting of refrigerator cars to railroads and the performing of protective services to perishable freight. *United States v. The Fruit Growers Express Co.,* 279 U. S. 363 (1929), held that Fruit Growers Express was not a common carrier by railroad under the Interstate Commerce Act.

The most recent holding in this field reaffirms that result as to Fruit Growers Express Co. and reaffirms the holding of this court in *Gaulden v. Southern Pac. Co.,* op cit. In *Hetman v. Fruit Growers Express Co.,* 346 F.2d 947, the Court of Appeals for the Third

Circuit considered the contention that the defendant was a common carrier by railroad within the meaning of the Federal Employers' Liability Act. The Court rejected the contention in the following language:

> (1) We are of the opinion that the District Court correctly held that the defendant is not a "common carrier by railroad" within the meaning of the Act.
>
> We need go no further than to cite *Gaulden v. Southern Pac. Co.*, 78 F.Supp. 651 (N. D. Cal. 1948), aff'd per cur. 174 F.2d 1022 (9 Cir. 1949), where it was held that the Pacific Fruit Express Company, which conducted a business similar in all critical aspects to that of the defendant, here, and which was also wholly owned by railroads, was not a "common carrier by railroad" within the meaning of the Act. It would serve no useful purpose to here restate what was so well said in Gaulden in its analysis and application of the Act or to make repetitious reference to the cases therein cited in support of the court's holding.

III

ICING OF RAILROAD CARS DOES NOT CONSTITUTE EMPLOYMENT BY A COMMON CARRIER

It is clear that plaintiff was employed by PFE which is not a common carrier by railroad. Moreover, it is settled that service on or around railroad equipment, including icing of refrigerator cars, does not constitute employment by a common carrier by railroad. It is not the equipment which plaintiff is servicing or working about that is critical; for a railroad relationship to exist a railroad must have the power to control and direct plaintiff's services. *Aguirre v. Southern Pacific Company, supra; Gaulden v. Southern Pacific Co., supra; Moleton v. Union Pac. R. R., supra; Wells Fargo and Co. v. Taylor, supra.* The plaintiff here was subject to the direction and control of the PFE. Under these circumstances plaintiff was working exclusively for PFE, an independent contractor, and not in any sense for the railroads.

Dated: January 20, 1966.

Corrigan and Roy
/s/ Donald Roy
Attorney for Defendant
Pacific Fruit Express Co.

[The opinion of the California District Court of Appeal in *Aguirre v. Southern Pacific Co.*, 232 Cal. App. 2d 636, 43 Cal. Rptr. 73 (1964), is omitted.]

State of California
City and County of San Francisco—ss.

Affidavit of W. G. Cranmer

W. G. Cranmer, being first duly sworn, deposes and says:

I am Assistant to the Vice President and General Manager of Pacific Fruit Express Company. Pacific Fruit Express Company (hereinafter referred to as "PFE") was incorporated in Utah in 1906. Its stockholders at that time, and now, are Union Pacific Railroad Company and Southern Pacific Company, each of which owns 120,000 shares of its common stock. PFE owns and maintains a fleet of refrigerator cars and refrigerated trailers specially designed to hold perishable commodities, such as fruits and vegetables, and rents them to practically all railroads in the United States, Canada and Mexico. PFE also furnishes protective services against heat or cold to commodities carried in said cars or trailers, by the use of ice or mechanical refrigeration for cooling, or portable alcohol heaters, for mechanical means for heating. PFE, as of December 31, 1965, owned and leased 20,852 refrigerator cars and 2039 trailers. It has approximately 3,700 employees. PFE has formal written contracts to render protective services to a number of railroads, including Western Pacific Railroad Company; Chicago and North Western Railway Company; Chicago, Milwaukee, St. Paul and Pacific Railroad Company; Chicago, Rock Island and Pacific Railroad; Chicago, Burlington & Quincy Railroad Company; Norfolk & Western Railway Company, Chicago

Great Western Railway; Illinois Central Railroad; St. Louis-San Francisco Railway Company; Southern Pacific Company, and Union Pacific Railroad Company. By virtue of other contractual arrangements, PFE supplies refrigerator cars to any railroad in the United States desiring to use them, and any railroad using a refrigerator car currently pays PFE a rental varying from 4.5 to 5.25 cents per mile for each mile the railroad may move the PFE car.

PFE does not directly or indirectly serve the shipping public as a common carrier by railroad. It is a supplier of services and vehicles to railroads, and does not hold itself out to render transportation service as a common carrier by railroad. PFE also has contracts with approximately fifty railroads covering the leasing of trailers. It is currently negotiating similar contracts with the other railroads in the United States, Canada and Mexico.

None of the properties or facilities acquired by PFE subsequent to its organization in 1906 were turned over to it or acquired from Southern Pacific Company or Union Pacific Railroad, but were acquired or constructed by PFE with its own funds. Prior to the organization of PFE in 1906, Southern Pacific Company and Union Pacific Railroad Company did not furnish refrigeration services directly, but contracted for these services with private concerns.

PFE does not issue bills of lading nor does it publish tariffs as a common carrier by railroad. Tariffs containing rates for the movements of perish-

ables are published by railroads, and PFE is not a party to such tariffs. PFE does not report to the California Public Utilities Commission, nor to any other state utilities commission. PFE files financial data with the Interstate Commerce Commission, and the Commission's authority is limited to the receipt of such data and the prescribing of the form of accounts. The Interstate Commerce Commission does not exercise any jurisdiction over PFE as a carrier.

PFE operates its business entirely with its own personnel and none of its employees are joint employees with either Southern Pacific Company or Union Pacific Railroad Company, or both. None of the directors of PFE are directors of Southern Pacific Company or Union Pacific Railroad Company. PFE operations are supervised by Mr. L. D. Schley, its Vice President and General Manager, whose office is at 116 New Montgomery Street, San Francisco, California. Neither Southern Pacific nor Union Pacific owns or has any interest in this building, and their San Francisco offices are at different addresses. PFE has its own car service, traffic, mechanical and engineering, purchasing and stores, and accounting departments which are completely separate from and independent of Southern Pacific and Union Pacific. The Vice President and General Manager of PFE reports to the President of PFE and to its Board of Directors. PFE has its own bank accounts in San Francisco; New York City, and Montreal, Canada. Its principal bank account is in the Crocker-Citizens National Bank, and its average balance is in excess

of a million dollars. All PFE expenses are paid from said bank accounts and its income from car rentals and protective service activities is deposited in said accounts. The Board of Directors of PFE holds regular meetings in New York City. PFE's net income for 1964 was approximately $5,000,000.00. As of the end of November 1964 the net assets of PFE were approximately $120,000,000.00. (1965 figures are not yet available.)

PFE's main general shops and the ice plant where Elisha Edwards worked are located at Roseville, California, on property owned and leased by PFE. The shops occupy an area about one and one-half square miles and the ice plant occupies an additional area about two hundred feet wide by one and one-eighth miles in length. The accident alleged to have occurred to plaintiff herein occurred on the ice plant premises, on a roadway running between icing docks. All of PFE's work and services at Roseville are supervised and controlled by its own officers and employees, and none of such work and services are subject to the supervision and control of any officer or employee of Southern Pacific Company or Union Pacific Railroad Company.

PFE has no rail motive power, except two shop switch engines used exclusively for shop switching purposes entirely within its own facilities at Roseville, California and Tucson, Arizona. The only railroad tracks owned by PFE are shop tracks and loading tracks. The former are used only in the operation of its car shops. The latter are used only for deliver-

ies of ice to PFE, which ice is made by PFE and used to furnish protective service. The only movement of cars by PFE is at its own shops. These movements are incidental to the repair of cars in PFE shops and to the furnishing of protective services. When PFE cars need repairs at Roseville, they are switched to the PFE repair tracks by a Southern Pacific locomotive and PFE pays Southern Pacific for this service. A similar payment is made to Union Pacific in Union Pacific territory.

Pacific Fruit Express Company officers negotiate and execute agreements with labor organizations representing PFE employees.

On November 9, 1963, Elisha Edwards was employed by PFE as an iceman. An iceman's duties are comprised chiefly of moving ice from one location to another, operating conveyors, and chains, installing and removing portable heaters, loading and unloading ice in bodies of cars, refueling mechanical cars, and other miscellaneous protective service work. All of Mr. Edwards' supervision was from PFE personnel. On the date of November 9, 1963, and for some time prior thereto, Mr. Edwards was employed only by PFE and not the Southern Pacific Company or the Union Pacific Railroad Company. Iceman's duties are done solely by PFE employees and there are no employees of Southern Pacific Company or Union Pacific Railroad Company engaged in performing such services for PFE at Roseville.

The PFE has been subject to the Workmen's Compensation Laws of the State of California since their

enactment. Pursuant to those laws, the plaintiff has been paid by PFE $6,436.10 in Temporary Compensation and has been furnished medical care and hospitalization.

Dated: this 20th day of January, 1966.

/s/ W. G. Cranmer

[Title of Court and Cause]

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant relies most heavily upon *Wells Fargo v. Taylor,* 254 U.S. 175 (1920). Plaintiff Taylor was an employee of Wells Fargo Company and was assigned to ride the express car while the car was being towed by a railroad company. The Court narrowly construed the F.E.L.A. such that the statutory language "common carrier by railroad" was held to mean "one who operates a railroad as a means of carrying for the public,—that is to say, a railroad company acting as a common carrier." The unfriendliness of the Court to the Act is revealed by the balance of the opinion. Mr. Justice Van Devanter, speaking for the Court, held that it would be "inequitable" were the employee to recover for negligently inflicted injuries (there was no question of workmen's compensation here) against the railroad or the express company, since Taylor had been required to sign a contract in

which he "assumed the risk" of his employment and agreed to hold both his employer and the railroad harmless from liability for their own negligence. The Court felt that it would deprive the employee of his freedom of contract to allow him to maintain a common law action for negligence and it held that he was not under the protection of the non-assumption of risk clause of the Act.

The Federal Employer Liability Act, 45 U.S.C. 51, was enacted in 1908, 35 Stat. 65, after a prior act had been declared unconstitutional (Act of 1906, 34 Stat. 232.). The subsequent act was H.R. 20310, 60th Congress and was reported out of the House Judiciary Committee in H.R. Report 1386 (a copy of which is appended). On page six of that report, the committee discusses the purpose of section 5 of the Act. "Section 5 renders void any contract or rule whereby a common carrier seeks to exempt itself from liability created by this act." Later in the discussion at the bottom of page 6 a hypothetical example of the provision that the section seeks to void is set out. *American Express Company* is chosen as the subject of the example and it is *perfectly clear* that Congress intended such companies to be covered under the Act. In the *Wells Fargo* case the Court was dealing with exactly the same type of company and yet the Court failed to consider the clear legislative intent expressed in H.R. Report 1386 (60th Congress). Perhaps the Court did not have the text of the report before it when it made the decision, but in view of the history of that period it is more likely

that the Court was disregarding the legislative purpose. The Act was amended in 1910 to insure a more liberal interpretation of the death section and to clarify jurisdictional questions (See H.R. Report 513 [61st Congress] appended hereto.). The Act was again amended in 1939 (53 Stat. 1404) to overrule the restrictive effect of decisions which had held that employees of admitted common carriers could not recover under the Act unless they themselves were engaged in interstate commerce at the time of the death or injury. (The amendment overruled *Shanks v. D.L. & W. R.R.*, 239 U.S. 556) (See Senate Report 661, 76th Congress appended hereto). The 1939 enactment was not an overall revision of the statute as can be seen from the limited objectives set out on page 2 of Senate Report 661.

Gaulden v. Southern Pacific, 78 F. Supp. 651, and *Aguirre v. Southern Pacific*, 232 Cal App 2d 636, relied upon by defendants follow *Wells Fargo*, supra, and depend entirely upon it for their vitality. *Aguirre* simply follows *Gaulden* and since the latter is merely an intermediate appellate court decision of the state courts in California, it does not require separate discussion. The *Wells Fargo* case is plainly and markedly out of the spirit of the modern commerce clause cases and the courts in both *Gaulden* and *Aguirre* demonstrated a marked reluctance to follow it. Plaintiff's major contention is that the Supreme Court has, *sub silento*, overruled the whole line of cases upon which defendant relies, including *Wells Fargo v. Taylor*, supra.

In 1937 in the case of *Jones and Laughlin Steel Co. v. N.L.R.B.*, 301 U.S. 1, 81 L. Ed. 893, the Supreme Court overruled the entire restrictive line of commerce clause cases that typified the late Ninteenth and early Twentieth century. That ruling was extended to include the working conditions of employees engaged in interstate commerce in *United States v. Darby,* 312 U.S. 100, 85 L.Ed. 609, the case in which the Wages and Hours Act was upheld. In the famous case of *Wickard v. Filburn, 317 U.S. 111, 87 L.Ed.* 122, the Court extended the effect of the commerce clause to include any activity which directly or indirectly affected interstate commerce. The 1965 cases of *Heart of Atlanta Motel v. Katzenbach,* 379 U.S. 241, and *Katzenbach v. McClung,* 379 U.S. 294, illustrate the extreme liberality with which the commerce clause is applied at present. These cases plainly indicate that the rule of liberal construction has become firmly established for statutes based upon the Commerce Clause. It seems equally clear from the legislative history discussed earlier, that F.E.L.A. was intended to be applied liberally and in particular to express company employees (See H.R. Report 1386, 60th Congress, appended hereto). The phrase "common carrier by railroad" was intended to include all activities closely connected with the actual carriage of goods by railroad in interstate commerce. The terminal company cases, which will be discussed below followed a liberal interpretation of the Act from the beginning.

The plaintiff here contends that this court is not confined by the *Wells Fargo* case. The whole narrow restrictive policy on which Wells Fargo was based has been rejected in *Jones and Laughlin Steel Co. v. N.L.R.B., supra* and the long line of cases following that historic decision. The rejection of the old policy has implicitly overruled the *Wells Fargo* case itself. It is to be noted that none of the Supreme Court authority cited by defendant is more recent than 1929 and the *Wells Fargo case itself is a 1920 decision.*

Moreover, it is to be noted that employees of the express companies have been included in other statutes dealing with common carriers by railroad enacted since F.E.L.A:

The Railway Labor Act, 45 U.S.C. 151 (1926), The Railroad Retirement Act, 45 U.S.C. 228(a) (1935), the Railroad Retirement Tax Act, 26 U.S.C. 1532, the Carriers Taxing Act, 45 U.S.C. 261 (1935—since repealed), and The Railroad Unemployment Insurance Act, 45 U.S.C. 351 (1938). The inclusion of refrigerator car companies under all these statutes was accomplished by including in the statutes a description of the activities that constituted those of a common carrier by railroad, "icing" cars being specifically included. Throughout these statutes is present the clear Congressional intent to treat all activities closely related to common carriage by railroad as subject to the various acts regulating common carriers by railroad. PFE has been subject to all the named acts because its activities fall within those listed as

activities of a common carrier by railroad as noted in *Gaulden,* cited by defendants.

Defendant can find no support in *Ellis v. Interstate Commerce Commission,* 237 U.S. 434 (1914) since that decision does *not* involve the question of whether or not Armour was a common carrier by railroad. It was held that Armour was involved in interstate commerce but that the Commission could not presume to treat Armour as a common carrier without first establishing that it was such. The case involved a refusal by a witness to answer questions propounded by the Interstate Commerce Commission. Mr. Justice Holmes states, *obiter,* that Armour was not a common carrier, but no one, including the Commission, had said that it was. The nature of Armour's business does not appear in the case, nor is it of any moment in the decision. The case simply held that some of the questions propounded had to be answered and some did not, and that Armour was subject at least to some of the investigative power of the I.C.C.

United States v. Fruit Growers Express Co., 279 U.S. 363 (1929), is not determinative of the status of PFE as a common carrier by railroad. That case was a criminal action in which the defendant was prosecuted for making a false entry in a common carrier's report under the Interstate Commerce Act. It was found that the express company was not a common carrier. It is to be noted that the nature of Fruit Growers Express was considerably different than PFE. The so-called protective services is all that

Fruit Growers provided. In fact, the case indicates that icing cars was their entire business. They did not own cars or tracks as does PFE. The sole question before the Court in the *Fruit Growers Express* case was whether icing cars *without more* made the company a common carrier by railroad. PFE's other activities and extensive ownership of railroad equipment plainly distinguish the *Fruit Growers Express Company* opinion.

The Supreme Court has not spoken on the subject of express companies and F.E.L.A. since the *Wells Fargo* decision. But it has rendered another line of decisions, the terminal company cases, which plaintiff urges upon the court as stating the controlling law. Actually the facts of the instant case come closer to that line of authority than the so-called "express company" cases relied upon by the defendant. In *Fort Street Union Depot Company v. Hillen,* 119 F.2d 307 (1941) the court, dealing with a terminal company engaged chiefly in making up trains for interstate commerce and providing services for the trains that used the terminal, held that a terminal company is subject to the Federal Employer's Liability Act. Relying on *United States v. Brooklyn Eastern District Terminal,* 249 U.S. 296, and *Union Stockyard v. United States,* 308 U.S. 213, the Court said: It is no longer open to dispute that a terminal company engaged in furnishing facilities and services is a common carrier where the character of the service in its relation to the public demonstrates its nature as a common calling." In the *Union Stockyard* case,

supra, the terminal company was engaged in loading and unloading cars and providing various other services but did not own any cars or tracks. The railroads paid a fee to the terminal company for its services, and the tariffs of the railroads included these services without a separate charge being made for them. *No direct services were rendered to the public.* The United States Supreme Court held that the terminal company was a common carrier within the meaning of the Interstate Commerce Act, 49 U.S.C. 1-27. The similarity of this arrangement with that existing between various railroads and the defendant, Pacific Fruit Express, is clear; neither provides a direct transportation service to the public.

PFE indicates that it does not load and unload cars, but it does work very closely with the railroads in that connection. In *Union Stockyard* the company did not own railroad cars or tracks, but it provided services exclusively. PFE by its affidavit admits ownership of some twenty thousand refrigerator cars. (Defendant's Exhibit "B" 1:19-20.) In addition the *Union Stockyard* case clearly holds that it is not necessary that the service be provided directly to the public to make the company a common carrier by railroad. Nor does the ownership of motive power seem to be of particular significance, although PFE does admit to owning and operating switch engines. (Defendant's Exhibit "B" 4:4-7) Another of the terminal company cases was *United States v. Brooklyn Eastern District Terminal Co., supra,* 249 U.S. 296. The Brooklyn Eastern District Terminal Co.

provided a switching service to railroads in and out of its ocean terminal facility. It owned no cars, rendered no services to the public directly and owned only a small amount of track in and around the terminal facility. It was held subject to the Hours of Service Act as a common carrier by railroad engaged in interstate commerce in that case. (Followed in *Busch v. Brooklyn Eastern District Terminal*, 218 N.Y.S. 516, 218 App. Div. 782.)

McCabe v. Boston Terminal Company, 303 Mass. 450, 22 N.E. 2d 33, was also a terminal company case. The company owned no engines or cars. It owned tracks, the station and yard facilities. It directed switching and making up of trains, controlled traffic in the yards and did some loading and unloading. The plaintiff was injured unloading mail. The company was held to be a common carrier by railroad and the employee entitled to sue under the F.E.L.A. It appears from a comparison of defendant's affidavit (Exhibit "B") with these terminal company cases that PFE bears more resemblance to a terminal company than it does to an express company. A discussion of defendant's cases will tend to bear out this fact.

As previously noted it is not necessary to deal in detail with *Aguirre v. Southern Pacific*, 232 Cal App 636, because it merely relies on *Gaulden v. Southern Pacific*, 78 Fed. Supp 651. It is plaintiff's contention that *Gaulden* is in error though it is apparent the court had no basis for deciding otherwise because no authority was cited to the court which would have

led it to any other conclusion. The cases cited in support of plaintiff's position here were not brought to the attention of the court in either *Gaulden* or *Aguirre*.

Judge Goodman in *Gaulden* mentioned that the F.E.L.A. statute had been amended in 1939 without adding employees of express companies or refrigerator companies to the list of covered employees. It was inferred from that fact by the court that if Congress wished to cover these employees it would have added such groups when the statute was amended. As noted previously, the 1939 amendment was not a revision of F.E.L.A. and was confined to limited objectives set out in Senate Report 661, 76th Congress (appended hereto). A consideration of that report shows that the inference is not justified. It is more reasonable to conclude that the inclusion of companies such as Pacific Fruit Express under all the other statutes cited previously meant that Congress intended to include all railroad employees in a uniform statutory scheme. Considering the existence of the terminal company cases, it would easily have appeared to Congress that employees of companies such as PFE were already covered under FELA, especially in view of the doubtful vitality of the pre-1937 commerce clause cases.

It was previously mentioned that the basis of the *Wells Fargo* case was the holding that Wells Fargo was not a common carrier by railroad because it was not a railroad company. In *Fleming v. Railway Express Agency,* 161 F.2d 659, Railway Express *was* [illegible] carrier by railroad:

> "We are convinced that a common carrier is one who, for hire, engages in transporting commodities from one place to another, or in connection with another carrier, such as a railroad. It does not step outside its common carrier status because it only renders part, though a necessary part, of a transportation service, or because it renders its service as an agent of a common carrier."

Railway Express was held to be exempt from wartime price control legislation because *common carriers* were exempted. It is to be noted that Railway Express is now engaged in exactly the same business as Wells Fargo was in 1920. The *Wells Fargo* case is not cited in *Fleming,* but the implication is crystal clear that the *Wells Fargo* case is no longer the law, since the earlier decision had specifically held that Wells Fargo was *not* a common carrier by railroad. The language quoted above from *Fleming* is clearly inconsistent with Wells Fargo's holding that "common carrier by railroad" means "a railroad company acting as a common carrier."

To summarize the argument: The terminal company cases represent the more liberal line of cases applying F.E.L.A. to entities where the character as a railroad is subject to question. The *Boston Eastern District Terminal Co.* case is the earliest, 1919. This case was picked up and followed in the *Union Stockyard* case in 1939 after the great revolution in the attitude of the Court toward the commerce clause and legislation enacted pursuant to it, ushered in by the *Jones and Laughlin* case in 1937. Defendant has cited us *no*

Supreme Court case following *Wells Fargo* since 1937. The business of PFE appears from PFE's own affidavit to be more similar to that of the terminal companies than that of the express companies. The authority of the *Wells Fargo* case is very doubtful since its reasoning has been completely rejected by later authority. The non-application of F.E.L.A. to companies such as PFE is anomalous in any event since all the other major sections of title 45 are applied to PFE and similar companies, specifically on the theory that such companies are common carrier by railroad. Nothing about the amendment of the act in 1939 refutes that contention. It is clear from the affidavit that PFE is engaged in railroad operations and its employees are subject to all the hazards that railroad employees are.

It is therefore respectfully requested that PFE be held to be a common carrier by railroad within the meaning of 45 U.S.C. 51 and that defendant's motion for summary judgment be denied.

Dated: March 10, 1966.

Respectfully submitted,
Jack H. Werchick
Attorney for Plaintiff

[The following Congressional Reports, found at R. 50-65 and alluded to in the Memorandum of Points and Authorities in Opposition to Defendant's Motion for Summary Judgment, are omitted:

H. R. Rep. 1386, 60th Cong. 1st Sess. (1908)
H. R. Rep. 513, 61st Cong. 2d Sess. (1910)
S. Rep. 661, 76th Cong. 1st Sess. (1939)]

[Title of Court and Cause]

DECLARATION OF JACK H. WERCHICK

I, Jack H. Werchick, declare under penalty of perjury:

That I am an attorney licensed to practice in the State of California and am attorney of record for the plaintiff herein.

That I directed Leland P. Jarnagin to investigate the nature of Pacific Fruit Express and that he obtained at my direction the materials submitted under his affidavit.

That I submit those materials as tending to prove that Pacific Fruit Express is more extensively involved in railroad operations than the affidavit of W. G. Cramner, submitted by the defendants herein, would tend to indicate. That a substantial question of fact exists as to the nature and extent of the railroad operations of Pacific Fruit Express.

I call particular attention to the numerous references to railroad activity in the document entitled "Pacific Fruit Express" and to the apparent identity of Pacific Fruit Express, Southern Pacific and Union Pacific indicated on the document entitled "NOW—PFE goes Piggyback!" calling particular attention to the photographs of Car 301213 and the text below that photograph.

Executed at San Francisco, California, this 10th day of March, 1966.

Jack H. Werchick

[Title of Court and Cause]

DECLARATION OF LELAND P. JARNAGIN

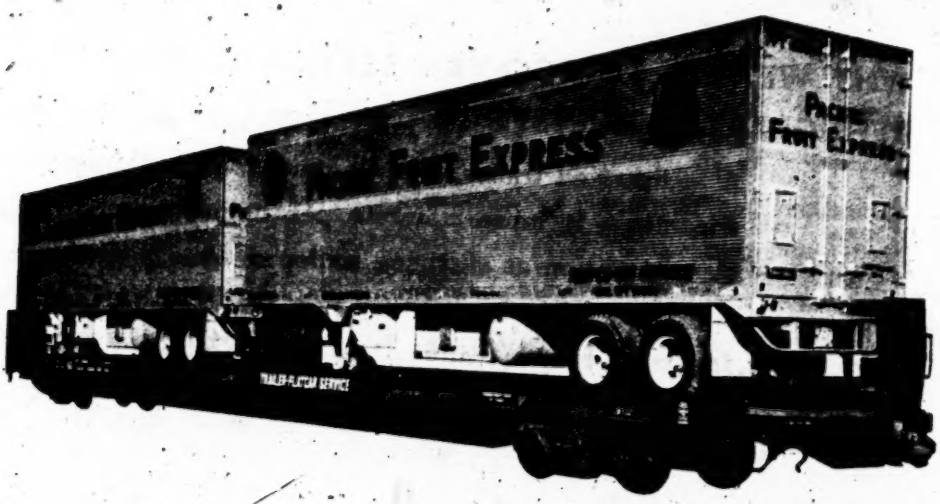
I, Leland P. Jarnagin, declare under penalty of perjury that if called as a witness I would testify, and the fact is that during the month of May, 1965, at the request of counsel for the plaintiff herein, I went to the office of Pacific Fruit Express at 116 New Montgomery Street in the City of San Francisco, California. I asked for material which described the activities of Pacific Fruit Express. I was handed the material attached hereto entitled "Pacific Fruit Express Company" and "NOW—PFE Goes Piggyback!" by personnel in the office of the company at that address. That the attached papers are the original papers handed to me by employees of Pacific Fruit Express Company at that time and place.

Executed at San Francisco, California this 10th day of March, 1966.

Leland P. Jarnagin

NOW—

PFE GOES PIGGYBACK!



Pacific Fruit Express presents **TEMPCO-VAN SERVICE**—and the 400 new refrigerated highway trailers/containers and 200 Piggyback rail flat cars just purchased to inaugurate it.

TEMPCO-VANS, the most modern trailers designed especially for combination highway and piggyback operation, are the latest addition to PFE's *first family of perishable transportation.*

WHAT WILL TEMPCO-VAN SERVICE DO FOR THE PERISHABLE TRADE?

Shippers and consignees want their shipments transported speedily and smoothly *and delivered to the market in top condition.*

TEMPCO-VAN service does this by combining the convenience of pick-up and delivery with the dependable railroad service of Southern Pacific and Union Pacific — PFE's owners.

WHY WE FEEL TEMPCO-VAN SERVICE IS FIRST IN REFRIGERATED TRANSPORT

A refrigerated trailer must do more than just transport and refrigerate — it must maintain perishable commodities in first-class condition at all times, under all conditions. Here is where the difference between PFE's new **TEMPCO-VANS** and other refrigerated trailers really counts. The **TEMPCO-VAN'S** air circulation and full perimeter cooling preserves freshness, quality and natural taste.

WILL ALL PERISHABLES, BOTH FRESH AND FROZEN, BE PROTECTED IN A TEMPCO-VAN?

Yes — because the temperature range is mechanically controlled from 10°F. below Zero to 80°F. above.

IS HEATER SERVICE AVAILABLE WITH TEMPCO-VANS?

Yes. **TEMPCO-VAN'S** unique mechanism also provides perfectly controlled heating and, by turning off the system, **TEMPCO-VANS** can be used as a non-refrigerated trailer for westbound dry freight shipments.

DOES TEMPCO-VAN PROVIDE AN ALL-PURPOSE TRAILER?

Yes. It gives unsurpassed PFE protective service against heat or cold. Sturdy construction and high-cube capacity provide a smooth ride for any load.

LOOK AT THESE TEMPCO-VAN VITAL STATISTICS:

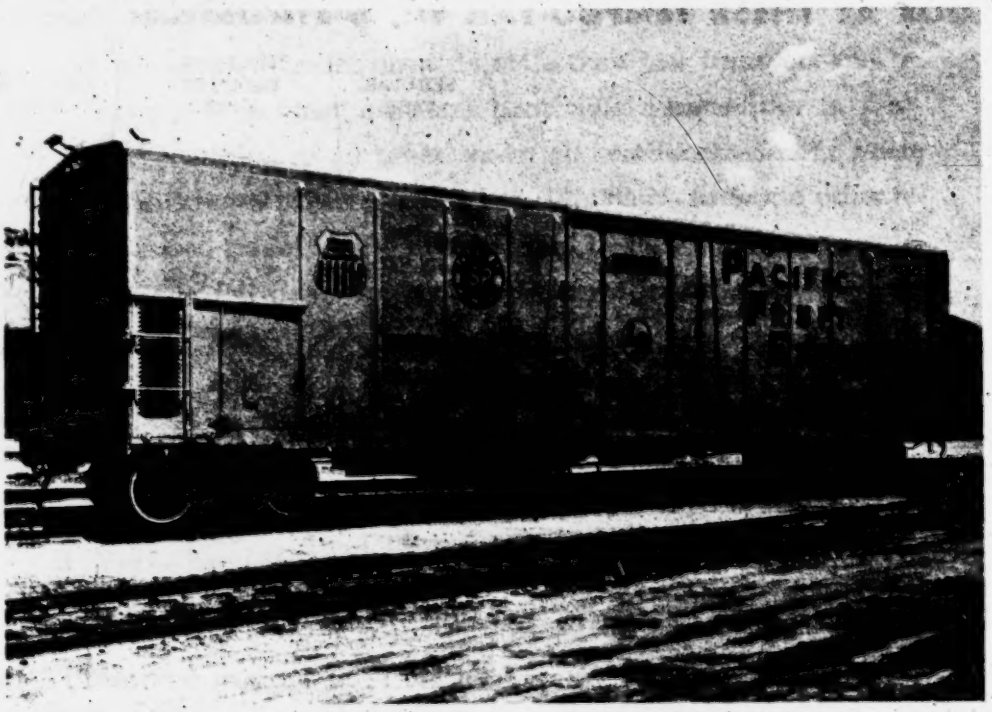
	REGULAR VANS	MEAT-RAIL EQUIPPED VANS	CONTAINER VANS
Number in service	180	200	20
Overall Width	8′ 0″	(same)	(same)
" Height	13′ 6″	"	"
" Length	40′ 0″	"	"
Inside Width	7′ 4″	7′ 4″	7′ 4″
" Height	8′ 1½″	7′ 9½″	8′ 1½″
" Length	37′ 9″	38′ 1″	38′ 4″
Total Cube	2249	2176	2264
Controlled Temperature Range	−10°F. to 80°F.	(same)	(same)

TEMPCO-VAN SERVICE IS IN PFE TRADITION

With over fifty years of Pacific Fruit Express service, PFE has come to mean "Perishables Finest Equipment." New **TEMPCO-VAN** service is now one more reason why perishable shippers will find even greater satisfaction as well as better performance by specifying Pacific Fruit Express service — either rail cars or refrigerated trailers.

OTHER PFE EQUIPMENT, FACILITIES AND SERVICES

- Total refrigerator car ownership 25,300
- Total mechanical cars owned 2,730
- Total Ice-Tempco cars owned 1,000
- Offices and Agencies in all principal Western producing areas; as well as in all major receiving and consuming areas.
- Car shops, ice plants and icing facilities at strategic locations across the country.
- Complete diversion and passing advice service.
- Specialized personnel to serve the perishable shipping and receiving trade.



PFE — the nation's largest operator of refrigerated rail cars.

For the finest in perishable transportation service throughout America, call

PACIFIC FRUIT EXPRESS

SOUTHERN PACIFIC • UNION PACIFIC

All three have offices in principal cities to supply your needs fast —wherever you are.

PACIFIC FRUIT EXPRESS COMPANY

The Pacific Fruit Express Company is one of the oldest refrigerator car companies in the business, having been organized in 1907 when it started with three employes. Contrasted with this it now has some 4,000 employes. However, transportation of perishable foodstuffs and other commodities which require protection against heat and cold were handled by railroads even as far back as 100 years ago. We have information about a carload of butter which moved in a "primitive" refrigerator car for several hundred miles from upper New York State to Boston, Massachusetts in July 1851.

Gradually through the years refrigerator cars, using water ice as a refrigerant, were improved by better construction, including addition of insulation and other devices and then about ten years ago mechanical refrigerating units were developed for use and several thousand cars equipped with such units are already in service.

The refrigerator cars shown in the attached photographs are of the most modern type. Car PFE 10351 is a "standard" car—we refer to it as such because it is by far the most numerous and uses ice and salt to produce refrigeration—is equipped with 4" of insulation in sides and ends and 4½" in the roof and floor. PFE 301213, is a 50-ft. mechanical car, has 7" of insulation in the floor, 7" in the walls and 10" in the roof, and is equipped with adjustable load dividers. These compare with the car of 50 years ago which used 1" or less of insulation. Of course, many

other improvements have been developed to give the cars longer life and much greater efficiency in accomplishing the purposes to which they are devoted.

We mention that the "PFE", as it is familiarly called in railroad and shipping circles, was organized in 1907; it was formally organized in that year, but when plans were laid for the Company in 1906, 6600 refrigerator cars were acquired and they constituted the Company's fleet at that time. We now have over 22,500 cars which is the largest single ownership in the country and constitutes about 30% of the nation's fleet of refrigerator cars.

So much experience has been obtained not only by actual service conditions but by intensive research which has been carried on through the years that it is now possible safely to handle all kinds of perishable foodstuffs and other commodities from and to every part of the country. About 1,000,000 carloads of such commodities move in the United States in the course of a year, and this Company originates and otherwise handles around 285,000 carloads or approximately 28% of the nation's total, the balance being handled by a considerable number of other private car owners, including the Santa Fe Refrigerator Dispatch owned, of course, by the Santa Fe Railway, the Merchants Dispatch owned by the New York Central, Fruit Growers Express owned principally by the Pennsylvania Railroad but also by a number of others, and the American Refrigerator Transit owned by the Missouri Pacific and Wabash

Railroads. These are the largest of the carline companies besides the PFE. The PFE is owned jointly by the Southern Pacific Company and the Union Pacific Railroad Company with which it has contracts for furnishing of refrigerator cars for perishable loading, and in addition has contracts with the Western Pacific Railroad Company and certain Mexican railways under which cars are provided for perishable loading on those lines.

Of course, the providing of cars is naturally one of the essentials of our Company but in another way it is equally essential that various facilities and services be provided to fill out the entire picture. For instance, we have to maintain and operate car shops at which cars are built and repaired. The PFE owns five of these located at strategic parts of the country along the lines of the Southern Pacific and Union Pacific Railroads. Supplementing these shops are light repair and cleaning stations at a number of places throughout the Western part of the United States.

The Company also operates eleven ice manufacturing plants located at various places along the lines of its Owning Railroads and here it manufactures a very considerable tonnage of ice each year; this together with ice purchased from commercial concerns amounts to close to 1,300,000 tons annually, and all of this is issued to the ice compartments in the ice bunker cars as they travel toward their destinations with their precious ladings of fruit, vegetables and

other foodstuffs and miscellaneous perishable commodities.

You will note on some of the attached pictures what appear to be trap doors on the tops of cars which are in elevated position. These are cover openings in the car roof through which ice in broken-up form is placed in what are called bunkers or ice tanks. The tanks take up several feet in either end of the car and something more than 10,000 pounds of ice are distributed to the two tanks in each car when they move under refrigeration service. After the cars are iced these "trap doors", which are more correctly referred to in the industry as a combination of plug and hatch cover, are lowered into the opening through which the ice has been placed in the car and thus you have actually a mobile ice box. When ice is not required for the preservation of the lading the hatch cover plug assembly can be elevated as shown in the pictures and when moved in this way air enters in one end and goes out the other accomplishing ventilation service for certain commodities. Then again during cold weather instead of requiring refrigeration some shipments require heat, and a special type of heater, thermostatically controlled, is used for this purpose; it is lowered into the ice tank compartment of the car securely affixed in place and thus performs its function.

In accomplishing the icing of cars as well as the placing of heaters in the bunkers the Company maintains at all of its ice plants and also at many other

points where servicing is accomplished, platforms which while varying to some extent in structure yet are elevated in such way that the deck is level with the tops of the cars. Ice is raised to these decks and moved by conveyor chains and from there issued by icemen into the tanks of the cars. A more recent development is mechanical icing machines which perform the work of icing cars in a much faster time and more efficiently than by hand.

Ice alone can cool commodities placed in the cars to average of 40° F., but with the addition of salt mixed with the ice the temperatures may be lowered depending upon the amount of salt used; the maximum being 30 per cent. With this rather large quantity of salt placed in and mixed with the ice in the process of servicing the cars in transit, temperatures as low as 10° F. could be obtained and it was with this high percentage of salt with ice that until the last few years the heavy volume of frozen foods shipped throughout the country was moved. However, while this method of transporting frozen foods proved satisfactory in producing the low temperatures indicated, demand developed for the equipping of cars for this kind of traffic with mechanical refrigerating units to provide zero temperatures. The PFE now has some 2700 of the heavily insulated cars with mechanical refrigerating units driven by diesel engines housed in one end of the car. These cars are equipped with thermostats which may be set for controlling temperatures during transit anywhere in the range from below zero to 70°.

In the years 1960 and 1961 PFE equipped 1,000 of its ice bunkers cars with units for constant operation of air-circulating fans while under load to produce controlled temperatures. These modified cars, called "Ice-Tempco" cars, have one end bunker removed and the remaining bunker has been enlarged to hold in excess of 7,000 lbs. of ice. The resulting increase in cubical loading capacity of these cars is about 10%. That means many commodities can be loaded heavier in the car and the constantly operating fans produce better refrigeration under thermostatically controlled temperatures. A 5 HP diesel engine is installed under the car, and an alternator or generator keeps the fans in operation at all times. The thermostat controls the operation of the fans and dampers or louvers which open and close as needed control the circulation of air throughout the car.

The thermostat control range of the Ice-Tempco cars is from 30 to 70 degrees with control settings provided in five degree increments. A "Heater Service" switch is provided in the thermostat control box, which when thrown to the "Heater Service" position, will reverse action of thermostat and provide heater service. When the commodity temperature falls below the desired set point, the fans which then become "heater fans" start and dampers open, by thermostat action, and bring the commodity up to desired set point. Actual heat is generated by an alcohol heater installed in the ice bunker.

PFE 20043 shown in attached photographs is an "Ice-Tempco" car.

Additionally, in June, 1961, PFE acquired several million dollars worth of refrigerator trailers for use in the piggyback rail field.

PFE's piggyback fleet consists of 425 forty-foot refrigerator trailers and 200 flat cars. The trailers are designated as "Tempco-Vans" and like PFE's mechanical refrigerator cars they give thermostatically controlled refrigeration and heater service. They are used for frozen foods as well as fresh fruits and vegetables and add to the many other features of PFE service the convenience of pickup and delivery. Tempco-Vans can be moved by tractor to locations most convenient for shippers for loading and when they have received their cargoes, they are rushed to rail centers where they are placed on railway flat cars, two trailers to the car. At their rail destination, they are again taken by tractor to the point of delivery.

Two piggyback trailers (Nos. 120004 and 120002) are shown in attached photograph loaded on flat car PFE 513145.

Naturally in the operation and administration of so large an enterprise a considerable number of specialists are required.

The construction and maintenance of our very large fleet of refrigerator cars requires an engineering staff and specialists both at headquarters and at the shops.

Similarly our refrigeration functions involve many scientific operations and we are staffed to handle this end of our business in the most efficient manner. We have other engineers assigned to handling all phases of the design, construction and maintenance of our car shop, store and ice plant buildings, structures and related facilities, also research and development activities. We have the necessary Accounting, Purchasing and Executive Departments, and last but not least, the operations of the Company that are referred to as Car Service operations. These latter operations consist in large part of car distribution, the furnishing of commodity protective services as ordered by the shipper, and what is referred to in railroad terminology as diversion and passing service.

As you might well imagine, car distribution is an operation that involves the provision of cars at proper places at the proper times and in condition that will permit the safe transport of products to points of use. This must be accomplished within the limits of reasonable economic necessities, which is to say that the cars must receive full employment without delays.

We have car distribution personnel mainly at San Francisco, Omaha and Chicago, but also in smaller numbers at many other points in the country, all of whom are linked together by telephone and telegraph. They gather information about crop conditions and future need of cars in various loading territories so that they can arrange with the various railroads to

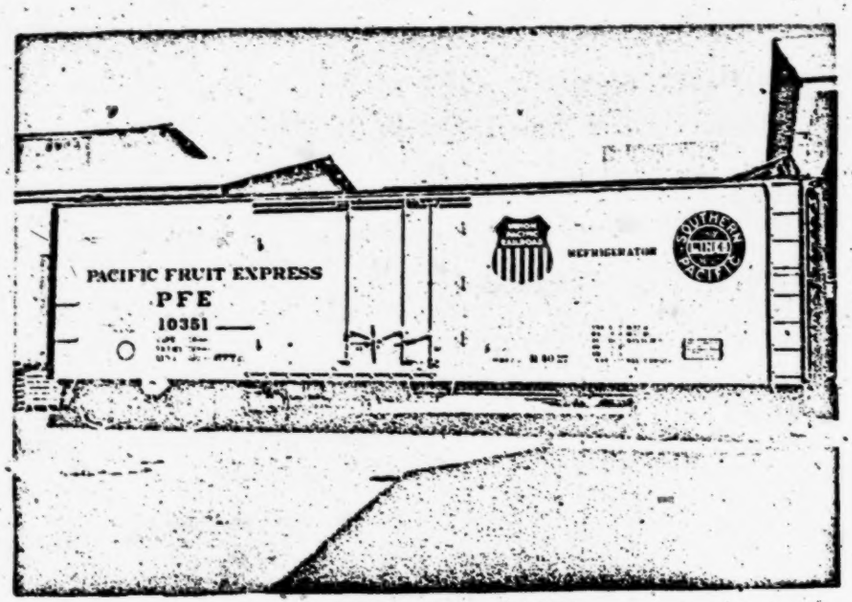
move available cars to such loading territories at exactly the right times. It is an intricate operation and one which requires constant attention and exercise of good judgment to keep the operation in balance.

Shippers of various perishable commodities must, of course, regulate their operations to meet the market demands of various consuming areas. They have to anticipate what future conditions will be and plant and harvest their produce accordingly. Nearly every carload of perishable commodities that moves is subject to the vagaries of market conditions and if after valuable produce is loaded into a car and it is started on its way to the consuming center, say an eastern market, it is learned that another area has better demand and offers a better price, the shipper will call us on the telephone and request that we "divert" the car from its originally billed destination to the new destination. That is the basic meaning of the word "diversion." In handling some 285,000 carloads of perishables a year we are called upon by shippers to accomplish in the neighborhood of 170,000 diversions a year. This involves a vast amount of clerical work and telegraphing and telephoning. We have sizable diversion forces at Chicago, which as you know is a major railroad center, as well as at a great many other points. These same forces through an intricate system of telegraphic reportings are aware at all times where each and every loaded car may be and we keep shippers informed when their shipments "pass" cer-

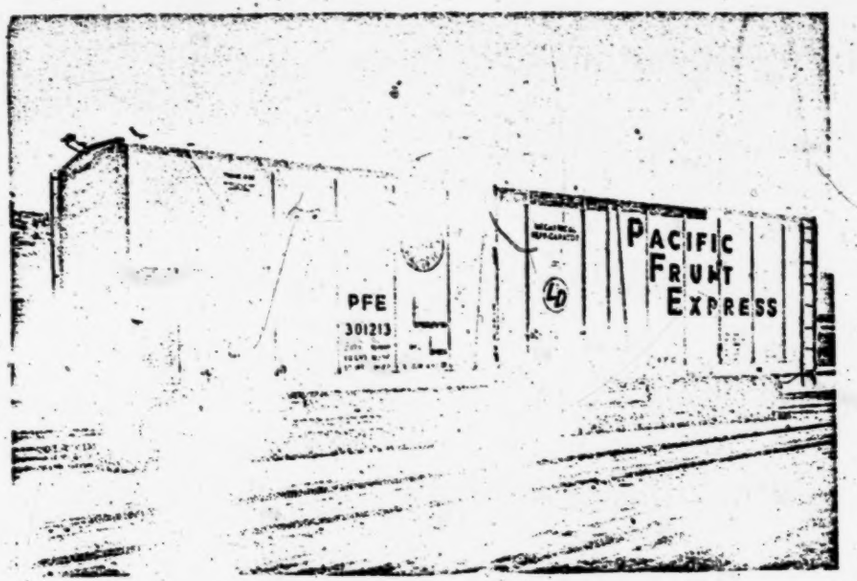
tain points, and this is what we mean when we speak of "passing service."

(See next attached for photographs mentioned herein)

Office of Vice President & General Manager
San Francisco, California
March 1, 1963

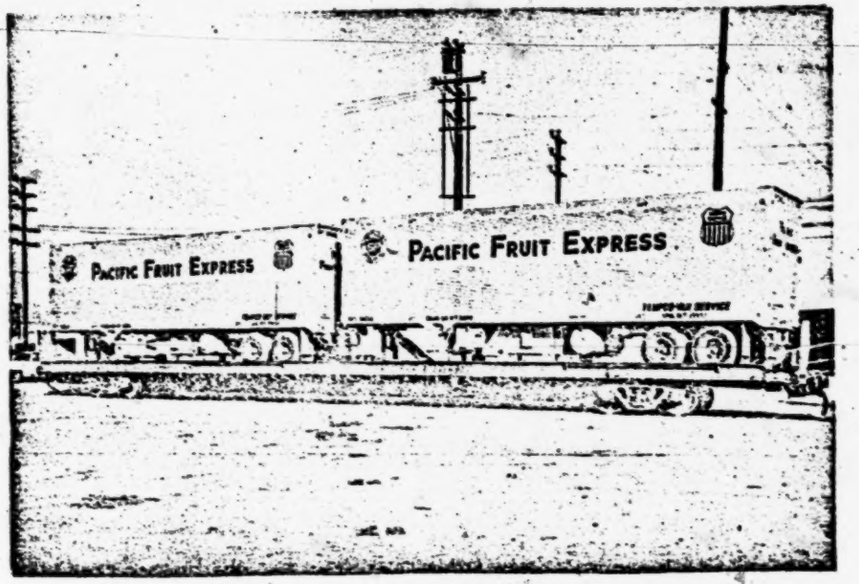


PFE Car No. 10351
Standard Refrigerator Car
Built in February 1957



PFE Car No: 301213
50-ft. Mechanical Car

Ice-Tempco Car



Piggyback trailers on flat car

United States District Court
Northern District of California
Southern Division

No. 44,413

ELISHA EDWARDS,
Plaintiff,
vs.
PACIFIC FRUIT EXPRESS COMPANY,
a Utah Corporation,
Defendant.

SUMMARY JUDGMENT FOR DEFENDANT

This case coming on to be heard before the Honorable Albert C. Wollenberg upon motion of defendant Pacific Fruit Express Company for summary judgment, the plaintiff, Elisha Edwards, being represented by Messrs. Werchick, Kiriakis & Sullivan, by Arne Werchick, Esq., and defendant, Pacific Fruit Express Company, being represented by Messrs. Corrigan & Roy, by Donald O. Roy, Esq., and the Court being fully advised, it is found that the defendant Pacific Fruit Express Company was not at the time of plaintiff's injury a common carrier by railroad subject to the Federal Employers' Liability Act, 45 U.S.C. Section 51 et seq. It is therefore found that the complaint fails to state a claim against de-

fendant Pacific Fruit Express Company, upon which relief can be granted.

It Is Therefore Ordered And Adjudged that defendant Pacific Fruit Express Company is hereby granted judgment against plaintiff.

Dated: MAR 18 1966

Albert C. Wollenberg
Judge of the United States
District Court

United States Court of Appeals
for the Ninth Circuit

No. 21,020

ELISHA EDWARDS,
Appellant,

vs.

PACIFIC FRUIT EXPRESS COMPANY,
Appellee.

[May 10, 1967]

On Appeal from the United States District Court
for the Northern District of California

Before: CHAMBERS, HAMLEY and MERRILL, Circuit Judges.

Per Curiam:

This is an appeal from a district court determination that Pacific Fruit Express Company (P.F.E.) is not a "common carrier by railroad." Appellant, an injured P.F.E. employee, claims that P.F.E. is such a common carrier. At stake is appellant's attempt to proceed under the Federal Employee's Liability Act, 45 U.S.C. 51, et seq.

P.F.E. is a large refrigerator car company. It owns approximately 25,000 refrigerator cars and car-

ries about 28% of all refrigerated goods moving by rail. P.F.E. deals directly with the shipper and, among other activities, maintains a service by which it keeps the shipper posted as to the whereabouts of its goods in transit, thus allowing the shipper to order goods diverted from one destination to another.

In asking this court to decide that P.F.E. is a "common carrier by railroad," appellant necessarily asks that we overrule the case of *Gaulden v. Southern Pac. Co.*, 78 F. Supp. 651 (N.D. Calif.), aff'd 174 F.2d 1022, which construed the term narrowly to exclude refrigerator car companies.* Were the slate clean, we might well be convinced by appellant's argument for a broader definition, but, as it is not, we choose to follow the unanimous line of authority and affirm. We note that since *Gaulden, supra,* was decided in 1949, Congress has not acted to bring refrigerator car company employees under F.E.L.A. protection.

Gaulden, supra, has been followed in *Hetman v. Fruit Growers Express Co.*, 3 Cir., 346 F.2d 947; *Moleton v. Union Pacific Co.*, 118 Ut. 107, 219 P.2d 1080, *cert. denied*, 340 U.S. 932; *Aguirre v. Southern Pac. Co.*, 232 Cal. App. 2d 636, 43 Cal. Rptr. 73.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1967

No. 465

ELISHA EDWARDS,
Petitioner,
vs.
PACIFIC FRUIT EXPRESS COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit

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No.

ELISHA EDWARDS,
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PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit

Petitioner, Elisha Edwards, respectfully prays that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case on May 10, 1967.

CITATIONS TO OPINIONS BELOW

The memorandum decision of the United States District Court for the Northern District of California

(R. 85-86), dated March 18, 1966, is unreported and is printed in Appendix A hereto, *infra*. The opinion of the Court of Appeals for the Ninth Circuit (R. 90-91) is not yet reported at the time of this writing and is reprinted in Appendix B hereto, *infra*.

JURISDICTION

The decision and judgment of the Court of Appeals was entered on May 10, 1967. (R. 89, 92.) Petitioner herein did not seek a rehearing before the Court of Appeals. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

QUESTION PRESENTED

Is Pacific Fruit Express Company a "common carrier by railroad" and therefore subject to liability under the Federal Employers' Liability Act where:

(a) it owns, controls, operates and services the largest fleet of refrigerated railroad cars and trailers in the United States;

(b) it controls the movement of its cars in transit;

(c) it holds itself out to the public as providing common carriage of perishable commodities by rail;

(d) it owns extensive railroad terminal, service and repair properties and facilities;

(e) it owns railroad tracks and locomotives which it uses in its operations;

(f) it is required to report its financial data to the Interstate Commerce Commission, using a form of accounts prescribed by the I.C.C., and to maintain its railroad equipment in compliance with the Federal Safety Appliance Act;

(g) it charges for the use of its railroads cars on the basis of the *distance* goods are carried in its cars;

(h) its employees are continuously exposed to the identical hazards faced by employees of operating railroads generally; and,

(i) it engages solely in operations having to do only with the railroad industry?

STATUTE INVOLVED

The statute central to this petition is Section 1 of the Federal Employers' Liability Act, 53 Stat. 1404, 45 U.S.C. §51:

> Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death

of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

STATEMENT OF THE CASE

This action arises under the Federal Employers' Liability Act and seeks damages for injuries caused petitioner, Elisha Edwards, while acting in the course of his employment by respondent, Pacific Fruit Express Company (P.F.E.), at Roseville, California. The complaint (R. 1-3) reflects that on November 9, 1963, petitioner was employed by respondent in furtherance of respondent's interstate commerce operations; because of the careless and negligent maintenance of appliances and premises by respondent,

petitioner was seriously and permanently injured when he was completely enveloped in burning gasoline; as a result, petitioner is disabled and disfigured and has prayed for general damages in the sum of One Million Dollars in addition to his special damages. Respondent's answer (R. 4-6) admits that it is a Utah corporation acting in interstate commerce; that petitioner was employed by respondent at the time of the accident; that petitioner was injured in the course of his employment;[1] and that it has in fact been necessary for petitioner to receive an as yet undetermined amount of medical care for his injuries. The employment in which petitioner was engaged when he sustained these injuries involved making respondent's railroad freight cars ready for the transportation of perishable commodities in interstate commerce by railroad. (R. 37.)

The general facts and circumstances surrounding the events and injuries are not, at least for present purposes, at issue. Shortly after interposing its answer, respondent moved for summary judgment (R. 10), alleging immunity from liability under the Federal Employers' Liability Act as a matter of law, and the district court granted the motion after concluding that Pacific Fruit Express Company is not a "common carrier by railroad." Because judgment occurred in the infancy of this litigation, the record is of ne-

[1]This follows from respondent's Sixth Affirmative Defense (R. 6) alleging payment of temporary workmen's compensation benefits for which the employment relationship to the injury would be a prerequisite to the application of California Labor Code § 3201 et seq. (industrial accident compensation).

cessity fragmentary and is primarily concerned with facts showing the actual nature of respondent's operations.[2]

Pacific Fruit Express is "one of the oldest refrigerator car companies" in the United States.[3] It engages some four thousand employees (R. 71), most—if not all—of whom have joined railroad labor unions formed as "brotherhoods" with which P.F.E. has entered into collective bargaining agreements.[4] Respondent owns, controls, operates and services the largest fleet of refrigerated railroad cars and trailers in the United States, consisting of twenty-five thou-

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[2]Verbatim extracts from the record used in this petition to describe respondent's business activities come solely from documents authored by respondent unless specifically indicated to the contrary. In fact, all data in the record illustrating respondent's activities was obtained from the hand of respondent, i.e., its affidavit supporting the motion for summary judgment (R. 34-39) and the publications introduced below by petitioner (R. 70-76), the origin and authenticity of which are not disputed by respondent. The publications are informally obtained advertising literature but are nevertheless admissible in evidence against respondent [Rule 43 (a), Federal Rules of Civil Procedure; California Evidence Code §§ 1220-1222, incorporating the provisions of former California Code of Civil Procedure § 1870 (2)] and, having been introduced in the district court without objection, they constitute material which may properly be used against respondent.

[3]Since its organization in 1907, P.F.E.'s sole shareholders have been Union Pacific Railroad Company and Southern Pacific Company. (R. 34.) Respondent maintains that there are no joint managerial or labor employees.

[4]Respondent so advised the district court in an affidavit filed on its behalf in *Gaulden v. Southern Pacific Co.*, 78 F.Supp. 651 (N.D. Calif. 1948), aff'd 174 F.2d 1022 (9th Cir. 1949). See 2555 Records of the U.S. Court of Appeals, Number 12062, TR 34. Respondent still maintains the same labor arrangements and deals with a railroad clerical brotherhood of which petitioner was a member at the time of the accident. Complete information is not presently available as to the number or identity of the railroad brotherhoods with which respondent now negotiates.

sand three hundred refrigerator boxcars, 2730 mechanical cars, and 1000 "Ice-Tempco" cars[5] (R. 70) and constituting essentially thirty per cent of the refrigerated railroad rolling stock in the nation.[6] Respondent aptly describes itself as the "nation's largest operator of refrigerated rail cars." (R. 71.)

Rail deliveries of perishable commodities which require protection against heat and cold "were handled by railroads even as far back as 100 years ago" (R. 71) and do not represent a modern innovation in the railway industry. An estimated one million railroad carloads of perishable commodities now move in the United States every year, and P.F.E. "originates and otherwise handles about 280,000 carloads or approximately 28% of the nation's total."[7] (R. 71.)

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[5]"Ice-Tempco" refers to the presence in the freight cars of "units for constant operation of air-circulating fans while under load to produce controlled temperatures." (R. 73.) The continuous involvement of P.F.E. with the commodities while being transported is further illustrated by the fact that P.F.E. also advertises "TEMPCO-VAN SERVICE" involving ownership and use of 400 refrigerated highway trailer-containers for receipt and delivery of goods and 200 "piggyback" rail flat cars to carry the containers. (R. 70.)

[6]Respondent during the year 1965 also operated 1946 refrigerator cars and 474 flat cars leased from the Southern Pacific Company and 1742 refrigerator cars and 474 flat cars leased from the Union Pacific Railroad Company. Interstate Commerce Commission, Annual Reports, *Transport Statistics in the United States*, Part 9, p. 7 (1965). It is unknown whether these leased cars are reflected in the figures cited above as published by respondent or whether they represent an additional aspect of respondent's railway car operations. In any event, respondent operates rolling stock owned by operating rail carriers as well as its own cars.

[7]The record reflects the existence of several other private refrigerator car companies (R. 71) but is silent regarding the organizational structure or actual operations of any but respondent. It is known, however, that respondent's transportation activities are considerably more extensive than those of at least one

Respondent is able "to handle all kinds of perishable foodstuffs and other commodities from and to every part of the country" (R. 71) as well as controlling the movement, direction and handling of cars in transit under what are termed its "Car Service Operations."[8] Pacific Fruit Express advises consumers that

> TEMPCO-VANS, the most modern trailers designed especially for combination highway and piggyback operation, are the latest addition to PFE's *first family of peristable transportation.*
>
> Shippers and consignees want their shipments transported speedily and smoothly *and delivered to the market in top condition.*[9]

Respondent advertises, moreover, that it has "offices and agencies in all principal Western producing areas" and in "all major receiving and consuming areas." (R. 70.)

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other refrigerator car company which does *not* service its rolling stock but simply leases its cars while an independently contracted company ices and otherwise services the railroad cars. See *Hetman v. Fruit Growers Express Company,* 346 F.2d 947 (3d Cir. 1965), which is therefore distinguished from the present case.

[8]These consist "in large part of car distribution, the furnishing of commodity protective services *as ordered by the shipper,* and . . . diversion and passing service." (R. 74, italics added.) Car distribution "involves the provision of cars at proper places at the proper times" in condition to transport perishables. Diversion operations are explained as involving the rerouting of freight cars by respondent whenever the shipper calls P.F.E. to request a change in destination; passing service involves notification to the shipper by P.F.E. of the precise location of each car bearing the shipper's goods.

[9]Respondent itself has provided these italics in the original publication, thereby deliberately emphasizing the carriage of goods as opposed to the servicing of rail cars.

Respondent describes its own *en route* services in a manner most suggestive of a kinetic carriage activity as distinguished from a static and limited rental and ice service:

> [Refrigerator trailers and cars] are used for frozen foods as well as fresh fruits and vegetables and add to the many other features of PFE service and convenience of pick-up and delivery. (R. 73-74.)
>
> . . . [I]f after valuable produce is loaded into a car and it is started on its way to the consuming center, . . . it is learned that another area has better demand and offers a better price, the shipper will call us on the telephone and request that we "divert" the car from its originally billed destination to the new destination. . . . In handling some 285,000 carloads of perishables a year we are called upon by shippers to accomplish in the neighborhood of 170,000 diversions a year. . . . We have sizable diversion forces at Chicago . . . [which] are aware at all times where each and every loaded car may be and we keep shippers informed when their shipments "pass" certain points. . . . (R. 74-75.)

In 1965 P.F.E.'s cars accounted for over one billion miles of railroad car movement in the United States.[10]

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[10] I.C.C., *Annual Reports, supra,* note 6. By comparison, in 1962 the estimated total freight car-miles by all "Class I railroads" (traditional railroad corporations, excluding terminal companies, switching roads, and particularly small railroad companies) was approximately twenty-seven billion miles. U.S. Dept. of Commerce, *Statistical Abstract of the United States* (1963), No. 787, p. 579.

All of respondent's rolling stock illustrated in its brochures, and also plainly visible to passersby on railroad or highways, clearly bears respondent's name, while the insignia of its owners appear in distinctly subordinate detail. The public, moreover, is exhorted to contact P.F.E. directly "for the finest in perishable transportation service throughout America" since respondent maintains "offices in principal cities to supply your needs fast—wherever you are." (R. 70.) Perhaps most revealing is the fact that P.F.E. facilitates direct contact with the consumer by holding itself out to the public in major cities across the United States as a carrier by railroad. A random sampling revealed that P.F.E. is listed—under its own corporate name—in the recent classified telephone directories of Minneapolis,[11] Omaha,[12] Sacramento,[13] and San Francisco[14] under the index heading *"Railroad Companies"* and of Chicago,[15] Cincinnati,[16] Cleveland,[17] Denver,[18] Detroit,[19] Kansas City (Kansas and Missouri),[20] Pittsburgh,[21] Portland (Oregon),[22]

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[11] p. 557 (November, 1966).

[12] p. 333 (1966).

[13] p. 576 (January, 1967). Petitioner's injuries were sustained at respondent's terminal located but a short distance from Sacramento, California.

[14] p. 761 (1966).

[15] p. 1650 (1966).

[16] p. 534 (June, 1966).

[17] p. 809 (April, 1966).

[18] p. 643 (July, 1966).

[19] p. 1164 (September, 1966).

[20] p. 620 (February, 1967).

[21] p. 636 (December, 1966).

[22] p. 629 (1966-1967).

Salt Lake City,[23] Seattle,[24] and Tucson[25] under the heading *"Railroads"*.

Pacific Fruit Express owns extensive terminal and service properties and facilities, none of which is or was wholly or partially owned by Southern Pacific or Union Pacific, respondent's owners. (R. 35.) Respondent maintains and operates five car shops at which railroad freight cars are built and repaired at various locations in the United States and has supplemental light repair and cleaning stations at a number of places through the western states.[26] (R. 72.) Respondent operates eleven ice manufacturing plants nationally and also purchases ice from other commercial concerns to meet its refrigeration demands. (R. 72.) *Deliveries of ice are made on railroad tracks owned by respondent, and repairs are accomplished by hauling cars over tracks owned by P.F.E. by means of locomotives also owned by respondent.* (R. 37.) Respondent is not only required to operate and maintain its own railroad equipment in compliance with the Federal Safety Appliance Act[27] but also undertakes

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[23]p. 356 (June, 1966). This, it should be noted, is respondent's state of incorporation.

[24]p. 584 (March, 1966).

[25]p. 319 (June, 1966).

[26]Common carriers by railroad, it appears, characteristically maintain and operate facilities for the construction and repair of their own stock. Cf. *Southern Pacific Co. v. Gileo*, 351 U.S. 493 (1955).

[27]27 Stat. 531, 45 U.S.C. §1 et seq. This fact was found and reported by the California District Court of Appeal in *Pacific Fruit Express v. McColgan*, 67 Cal.App.2d 93, 97, 153 P.2d 607 (1944). That court also noted that maintenance and repair of respondent's railroad cars was accomplished both at its own facilities and, occasionally, at railroad repair shops owned by other companies. *Id.*

to repair railroad equipment owned by other companies at P.F.E. maintenance facilities.[28]

Respondent's revenues are generated by charging rates varying from 4.5 to 5.25 cents per mile for the use of each of its railway cars.[29] (R. 35.) Respondent's fees, therefore, are regularly based not on the providing of refrigeration service to a particular company for a specified term, nor on the length of service of a railroad car, nor on the actual cost of providing the services, but directly on the distance of the carriage of goods.[30] Respondent "files financial data with the Interstate Commerce Commission" which also prescribes the form of accounts to be used by respondent. (R. 35.) P.F.E.'s contracts are subject to approval by the I.C.C. before becominng operative,[31] thereby giving the Commission de facto regulatory authority over respondent's rates. Conversely, Pacific Fruit Ex-

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[28]See findings of facts by the district court in *Gaulden v. Southern Pacific Co., supra,* 78 F.Supp. 651, 654.

[29]*Id.* Respondent may on occasion lease a refrigerator car directly to a shipper on a monthly basis.

[30]The fact that respondent customarily issues no bill of lading or statement of charges directly to the shipper but instead relies upon contracting carriers to collect and forward its revenues is immaterial to any of the issues in this action. See *Union Stockyard v. United States,* 308 U.S. 213 (1939), where Union Stockyard was found to be a common carrier by rail notwithstanding the fact that *all* of its services and charges were rendered solely and directly to railroad companies and in no respect to the general public.

[31]*Gaulden v Southern Pacific Co, supra.* The court also found that the contract with respondent's owners, approved by the I.C.C. in 1942, provided for indemnification by P.F.E. of its owners against liability for injury or damage to personnel or property of the owners while acting on behalf of P.F.E. and fixed responsibility of P.F.E. for damage to any freight as a result of any improper service on its part.

press "does not report to the California Public Utilities Commission, nor to any other state utilities commission." (R. 35.)

The district court believed that the Federal Employers' Liability Act does not embrace respondent's operations as reflected by this record. The Court of Appeals, believing that "[w]ere the slate clean, we might well be convinced by [petitioner's] argument for a broader definition," elected nonetheless to revivify the strict construction applied originally by the district court in 1948 in *Gaulden v. Southern Pacific Company,* 78 F.Supp. 651 (N.D. Calif. 1948), aff'd without further opinion 174 F.2d 1022 (9th Cir. 1949), the earliest decision to approach the question of Employers' Liability Act application to a railway refrigeration company.

REASONS FOR GRANTING THE WRIT

Although the Employers' Liability Act may be the most litigated statute in American law, the judicial literature is almost totally barren of any conscientious effort to define the boundaries of this remedy. The crucial operative phrase, "common carrier by railroad", has been subjected only to the most superficial analysis, usually *en passant,* during the sixty year history of the act and is now urgently in need of judicial amplification lest a chance misconstruction become the means of depriving thousands of railroad employees of the protection established by Congress. In 1964 over six thousand persons were employed by

railroad refrigeration companies owned or controlled by other railroads,[32] and they are foreclosed from recovery under the Employers' Liability Act notwithstanding the fact that their employment continuously exposes them to the identical hazards which confront railroad workmen generally. Moreover, the entire fabric of the F.E.L.A. is now jeopardized by a regressive force contrary to modern construction of the act, for the decision of the court below is not limited in its impact to petitioner or his co-workers. It can easily be predicted, for example, that an identical question will soon present itself in the rapidly expanding area of trailer-on-flatcar (TOFC or "piggyback") operations.[33]

A. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH DECISIONS OF THIS COURT AND OF OTHER FEDERAL AND STATE COURTS

Petitioner is mindful of the fact that Pacific Fruit Express Company has been involved in earlier Employers' Liability Act litigation on three occasions, in each instance as a co-defendant with one of its owners. *Gaulden v. Southern Pacific Co., supra,* 78 F.Supp.

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[32] I.C.C., Annual Reports, *Transport Statistics in the United States, supra,* Part 9, p. 7 (1965).

[33] In the wake of the decision in *American Trucking Associations, Inc. v. Atchison, T. & S.F. Ry. Co.,* ..... U.S. ....., 18 L.Ed.2d 847 (1967), affirming the right of motor carriers to utilize transportation by rail in place of exclusively highway transport, one must expect continued expansion of railroad activities by companies handling TOFC operations almost exclusively but not organized within traditional "railroad" concepts. It thus seems inevitable that the question must soon arise as to the appropriate remedy for a "piggyback" workman injured in the preparation or execution of carriage of goods by railroad flatcar but not employed by a general service railroad.

651 (N.D. Calif. 1948), aff'd without opinion 174 F.2d 1022 (9th Cir. 1949); *Moleton v. Union Pacific Railroad,* 118 Ut. 107, 219 P.2d 1080 (1950), cert. den. 340 U.S. 932 (1951); *Aguirre v. Southern Pacific Co.,* 232 Cal.App.2d 636, 43 Cal.Rptr. 73 (1964). *Moleton* and *Aguirre,* uncritically and without renewed scrutiny, rely almost exclusively upon *Gaulden,* the California court finding the facts in all three actions to be substantially identical. 232 Cal.App.2d at 645, 649. The present case, however, clearly presents important and unresolved questions essentially of first impression. In contrast to each of the earlier suits, petitioner has not joined either of respondent's owners as a party defendant. Nor has petitioner sought to impute any of the operations of P.F.E.'s owners to respondent itself as was done in each of the other suits. Most significantly, each of the prior actions suffered from concentration on questions of agency, the contract between P.F.E. and its owners, joint enterprise and other theories directing attention *away* from a close examination of respondent itself.

Plaintiff in *Gaulden* made no real effort to show P.F.E. to be a common carried by railroad. His brief argument on this point was limited to urging the Court of Appeals to so find (if it rejected his intended approach to the case) simply because "Congress by the 1939 amendment to the Federal Employers' Liability Act liberalized and broadened the scope of the Act as to what constitutes interstate commerce. . . ." Brief for Appellant [Gaulden], 7-8, 2555 Records of the U.S. Circuit Court of Appeals, Number 12062. In

Moleton, the petitioner devoted only a very minute part of his brief accompanying his petition for a writ of certiorari to urge that "these employees of the express company are engaged in railroad work the same as persons in the general employ of the railroad company itself." Brief for Petitioner [Moleton], 33, 4163 United States Supreme Court Records, October Term, 1950, No. 468. Each of the earlier suits directed all of its thrust to the proposition that P.F.E. was essentially an alter ego of an operating rail carrier. Each shared a common shortcoming: court and counsel engaged in a fruitless search for *the* railroad—as between respondent and one of its owners—as if there could be convincing force in the bare fact that respondent commonly works *with* railroad companies. It was this attitude, taken by the court below and consisting of a harsh and narrow view of the problem, which militates in favor of review by this Court to bring respondent into the acceptable modern approach to the Employers' Liability Act.

The court below refused to attach significance to the most current pronouncement of this Court regarding the breadth of the F.E.L.A. One cannot reasonably presume that the unambiguous language of *Parden v. Terminal R. of Alabama Docks Dept.,* 377 U.S. 184, 189-190 (1964), is without great impact in this action:

> The language of the FELA is at least as broad and all-embracing as that of the Safety Appliance Act or the Railway Labor Act, ... If Congress made the judgment that, in view of the

> dangers of railroad work and the difficulty of recovering for personal injuries under existing rules, railroad workers in interstate commerce should be provided with the right of action created by the FELA, we should not presume to say, in the absence of express provisions to the contrary, that it intended to exclude a particular group of such workers from the benefits conferred by the Act.

Congress enacted broad protection for the working man against the perils of interstate rail commerce. It is the "danger to be apprehended" that invokes the shield of federal legislation, and it is immaterial from which segment of the railroad industry the peril may emanate. *United States v. California,* 297 U.S. 175, 185 (1936). This Court long ago determined that Congress intended to utilize the maximum reach of its authority to protect the railroad working force in interstate commerce "no matter what the source of the dangers which threaten it." *Mondou v. New York, N. H. & H. R. Co.,* 223 U.S. 1, 51 (1912) (the Second F.E.L.A. Cases).

The dangers of railroad work, the difficulties of recovering adequate compensation for railroad-associated injuries, the threat of injury to interstate commerce and persons engaged in furthering commerce are all present in respondent's operations in the same manner and to the same degree that they exist in the business of any general rail carrier. This is made more apparent by the fact that respondent's operations include every one of the elements found

to be significant in *Parden* in defining a common carrier by railroad.[34]

Whether a company such as respondent is a common carrier under federal railroad legislation depends upon what it in fact does, not upon its corporate character or its defensive protestations when threatened with suit. *United States v. California, supra,* 297 U.S. 175, 181. *Parden* stands for an uninterrupted judicial policy that the substance of a company's operations determines its F.E.L.A. status. The court below rejected this cardinal principle and adopted a peculiarly narrow approach toward the Employers' Liability Act.

In reaching its conclusion, the court below also rejected another distinguished line of cases which is both cogent and relevant in this discussion—the terminal company decisions. A terminal company ordinarily prepares, services, supervises and occasionally

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[34] At the outset, the *Parden* opinion describes those features of the Terminal Railway which make it "undisputably a common carrier by railroad engaging in interstate commerce":

> Consisting of about 50 miles of railroad tracks . . ., it serves those docks and several industries situated in the vicinity, and also operates an interchange railroad with several privately owned railroad companies. It performs services for profit. . . . It conducts substantial operations in interstate commerce. It has contracts and working agreements with the various railroad brotherhoods . . . ; maintains its equipment in conformity with the Federal Safety Appliance Act . . . ; and complies with the reporting and booking requirements of the Interstate Commerce Commission. *Id.*, 377 U.S. at 185.

Respondent too owns tracks, serves shippers and other carriers with its facilities, operates in conjunction with other railroads, endeavors to be profit making, operates in interstate commerce, has labor agreements with railroad brotherhoods, complies with the various safety appliance acts and regulations, and handles its financial records in compliance with regulations promulgated and supervised by the I.C.C.

operates railroad equipment between journeys and rarely acts upon the equipment while it is actually in use crossing state lines.[35] As such these businesses provide a service to general service rail carriers, own little and sometimes no railroad track or equipment, and—most significantly— differ from respondent in that they exercise *no control* over the actual interstate management and carriage of goods. There does not seem to be any instance of a terminal company holding itself out to the general public by advertising or directory listing as a common carrier by railroad. Nonetheless, because of the intimate involvement of terminal companies in interstate railroad commerce, they are included within the operation of the Interstate Commerce Act, *Union Stockyards v. United States,* 308 U.S. 213 (1939), the Hours of Service Act, *United States v. Brooklyn Eastern District Terminal Co.,* 249 U.S. 296 (1919); *Bush v. Brooklyn Eastern District Terminal Co.,* 218 N.Y.S. 516, 218 App. Div. 782 (1926), the Federal Safety Appliance Act, *United States v. California, supra,* 297 U.S. 175; *McCullough v. Jacksonville Terminal Co.,* Fla. App., 176 So. 2d 345 (1965), and—most notably—the Federal Employers' Liability Act. *Fort Street Union Depot Company v. Hillen,* 119 F.2d 307 (6th Cir. 1941); *Maurice v. California,* 43 Cal.App.2d 270, 110 P.2d 796 (1941). In *McCabe v. Boston Terminal Co.,* 303 Mass. 450, 22 N.E.2d 33 (1939), the Massachusetts Supreme Court had no hesitation in finding the ter-

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[35]See *Fort Street Union Depot Company v. Hillen,* 119 F.2d 307 (6th Cir. 1941); *McCullough v. Jacksonville Terminal Co.,* Fla.App., 176 So.2d 345 (1965).

minal company to be included under the Federal Employers' Liability Act but applied strict rules in the construction of the statute of limitations applicable thereto. This Court granted certiorari and, in a Per Curiam decision, rejected the narrow procedural holding of the lower court and reversed, thereby permitting the plaintiff therein to amend his pleadings to state a valid cause of action. 309 U.S. 624 (1940).

An organic interpretation of the F.E.L.A. as remedying hazards and wrongs inherent in an entire system of transportation is threatened by a highly particularistic and narrow philosophy, applied by the court below. This clash is apparent and of resounding significance. Resolution by this Court is essential. It is insufficient to rest upon the out-dated line of so-called "express company" cases. The *obiter dictum* of Justice Van Devanter in *Wells Fargo v. Taylor,* 254 U.S. 175, 187 (1920), certainly does not now suffice—if ever it truly did—to resolve this problem; to define a common carrier by railroad as "one who operates a railroad as a means of carrying for the public,—that is to say, a railroad company acting as a common carrier" wholly distorts the expressed will of Congress in this field. This completely ignores such railway operations as terminal companies, as well as other less generalized railroad operations which have since been brought within the F.E.L.A.[36] Yet the tired

[36]See, for example, *Eddings v. Collins Pine Company,* 140 F. Supp. 622 (N.D. Calif. 1956). This well-reasoned opinion found a lumber company which wholly owned and controlled a small railroad corporation to be a common carrier by railroad even though the lumber company was not organized as a railroad carrier under traditional lines.

reasoning of *Wells Fargo,* not even essential to the resolution of the question presented in that case, is too frequently resurrected to provide a shelter from the F.E.L.A. notwithstanding the total readjustment of interstate commerce thinking after the revolution of New Deal legislation and litigation.[37] The early tendency to narrow and dilute the F.E.L.A. which occupied much of the judicial literature during the first two decades following its enactment has been abandoned. The clear and explicit Congressional mandate for broad application has been recognized in almost every area of the railroad industry save the one presently before this Court.[38]

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[37]Respondent devoted a substantial portion of its argument to the district court to an exposition of the *Wells Fargo* decision. (R. 16.)

[38]*Wells Fargo* cannot be credited with any vitality in approaching the present question. It represents only a gratuitous finding that the express company was not *the* common carrier by railroad involved in that case. It is noteworthy that express companies have subsequently been recognized and classified as common carriers, and any exclusion of the application of the F.E.L.A. arises from their lack of railroad appliances and facilities rather than from any shortage of transportation activities in interstate commerce; they are common carriers by means other than railroad. *Fleming v. Railway Express Agency,* 161 F.2d 659 (7th Cir. 1947); *Jones v. New York Central,* 182 F.2d 326 (6th Cir. 1950); see also *Railway Express Agency v. Esformes,* 174 N.Y.S.2d 878, 12 Misc.2d 1038 (1958).

It bears comment that the court below cited *Hetman v. Fruit Growers Express Co., supra,* 346 F.2d 947 (3d Cir. 1965), as following *Gaulden.* The court in *Hetman,* however, decided that it "need go no further than to cite Gaulden . . . ." 346 F.2d at 949. Since the claimant in *Hetman* was not employed by the refrigeration car company, that decision suffers from the same defect as *Wells Fargo,* and any discussion of the status of the refrigeration company itself is *obiter dictum;* F.E.L.A. liability could not have attached to the car owner in any event since it did not employ the injured party. Moreover, Fruit Growers Express is significantly different in nature from respondent herein, and the *Hetman* decision is therefore distinguishable. See note 7 *supra.*

B. THE DECISION OF THE COURT BELOW PREVENTS UNIFORM APPLICATION OF A COMPREHENSIVE CONGRESSIONAL PROGRAM, LEAVING UNANSWERED SEVERAL QUESTIONS OF FAR REACHING SIGNIFICANCE

The Court of Appeals in this case has resurrected a barrier to the uniform application of the remedial legislative system governing the interstate transportation of commodities by rail. This totally ignored the development of the F.E.L.A. which has kept pace with the growth of remedial law generally, and in particular with the maritime sector. Compare, for example, *Southern Pacific Co. v. Gileo,* 351 U.S. 493 (1955), and *Guiterrez v. Waterman Steamship Corp.,* 373 U.S. 206 (1963).

> While government has rarely ever adopted a measure designed as a solution of some important social problem that could not be improved with time and experience, there has not yet been found any method of compensating injured railroad men and their next of kin that can be substituted satisfactorily for that provided by Congress in the FELA and the group of laws designed to supplement it. It has proved worthy to stand beside and in a position of equality with the remedies open to seamen, both in admiralty and in the law courts. Griffith, "The Vindication of a National Public Policy Under the Federal Employers' Liability Act," 1953, 18 Law and Contemporary Problems 160, 187.

It should be a matter of great and immediate concern that the decision of the court below flies in the face of this continuous trend toward liberalization by expressly electing to construe the central language of

the F.E.L.A. "narrowly" while rejecting the "broader definition" urged by petitioner. (R. 91.) The Court of Appeals candidly admitted its belief that the more remedial solution would be appropriate "were the slate clean," but nonetheless chose to adhere to the restrictive reasoning which was born of *Gaulden v. Southern Pacific Co., supra,* 78 F.Supp. 651.

This Court has heretofore had occasion to note the need for close scrutiny of the actions of lower courts in F.E.L.A. matters, since it requires rigorous supervision to insure that the beneficial purposes of that act not be thwarted by a "hostile philosophy." *Wilkerson v. McCarthy,* 336 U.S. 53, 69 (1948) (concurring opinion). The inference is inescapable from its brief opinion that the court below recognized the common carrier and railroad attributes of respondent and also observed the identity of railroad perils facing respondent's employees. Notwithstanding this, the Court of Appeals opted in favor of a judicial philosophy inimical to modern F.E.L.A. thinking.

It cannot be ascertained with any assurance whether construction of the crucial operative phrase "common carrier by rail" is properly a matter of fact or law.[39] Courts dealing with this language have, however, pro-

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[39]The distinction between a common carrier and a private carrier is often submitted to a jury for decision in analogous cases. Cf. *Arrow Aviation v. Moore,* 266 F.2d 488 (8th Cir. 1959) where the common carrier status of an air carrier was affirmed, the court relying in part upon the fact that the defendant advertised as a common carrier in telephone directories as does respondent herein; *Dairymen's Co-op Sales Assoc. v. Public Service Commission of Penn.,* Penna., 177 A. 770, 98 A.L.R. 218 (1935), where a marketing service for dairy concerns was found not to be a common carrier.

ceeded generally without hesitation to act by summary judgment or other summary procedures. Whether this question should more properly be addressed to the judgment of a court or a jury, it is plain that no soundness inheres in a determination made without reference to some applicable standard. Yet the decision below is not and cannot be explained in terms of any of the principles heretofore enunciated in the construction of the F.E.L.A. If this decision should pass unreviewed, the doors of the courts are closed to litigants—like petitioner—who labor under the very dangers which the F.E.L.A. was designed to alleviate.

The language of *Hamarstrom v. Missouri-Kansas-Texas R. Co.*, 233 Mo.App. 1103, 116 S.W.2d 280, 286 (1938), is illuminating:

> . . . [t]he expression "by railroad" in the federal statute is but descriptive of the kind of common carrier to which the statute relates, distinguishing railroads from common carriers of other kinds to which the act does not extend, and . . ., by the statute, it was not attempted or intended to define the kind of instrumentalities used on which their liability for negligence should exist or by which it should be limited . . . . (Citing Second Employers' Liability Cases, *supra*, 223 U.S. 1.)

Pacific Fruit Express Company has labored mightily to create for itself a treasured immunity from liability under the F.E.L.A. Nor is it presently subject to uniform state regulation, for it does not report to the California Public Utilities Commission or to any

other state utilities commission.[40] It now enjoys the incredible luxury of escaping responsibility under any comprehensive regulation or uniform liability system. Thus it is imperative that this Court act to establish guidelines to restore the symmetry desired by Congress in this field.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated, San Francisco, California,
August 2, 1967.

Respectfully submitted,
DAVID S. LEVINSON,
Attorney for Petitioner.

ARNE WERCHICK,
Of Counsel.

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[40]California Public Utilities Code § 202 excuses from the operation of that Code enterprises in interstate commerce. Were it not for this exemption, it appears that P.F.E. would be a common carrier by rail, under applicable California statutes. Pub. Util. Code § 229 includes all tracks, depots, yards, grounds, terminals and terminal facilities, and all other equipment used in rail transportation within the term "railroad"; § 230 defines a "railroad corporation" as every corporation which owns, controls, operates or manages any railroad in the state; § 211 declares every such railroad corporation to be a common carrier. Compare Arizona Constitution, Art. 15, § 10; Idaho Code Annotated §§61-113, 61-107; Montana Revised Code Anno. §§ 72:114, 72:115; Nevada Revised Statutes § 704.020; Oregon Revised Statutes § 760:010, all to the same general effect as the parallel California law.

(Appendices A and B Follow)

Appendix A

United States District Court
For the Northern District of California
Southern Division

No. 44413

Elisha Edwards,
Plaintiff,
vs.
Pacific Fruit Express Company,
a Utah Corporation,
Defendant.

SUMMARY JUDGMENT FOR DEFENDANT

This case coming on to be heard before the Honorable Albert C. Wollenberg upon motion of defendant Pacific Fruit Express Company for summary judgment, the plaintiff, Elisha Edwards, being represented by Messrs. Werchick, Kiriakis & Sullivan, by Arne Werchick, Esq., and defendant, Pacific Fruit Express Company, being represented by Messrs. Corrigan & Roy, by Donald O. Roy, Esq., and the Court being fully advised, it is found that the defendant Pacific Fruit Express Company was not at the time of plaintiff's injury a common carrier by railroad subject to the Federal Employers' Liability Act, 45

U. S. C. Section 51 et seq. It is therefore found that the complaint fails to state a claim against defendant Pacific Fruit Express Company, upon which relief can be granted.

It Is Therefore Ordered And Adjudged that defendant Pacific Fruit Express Company is hereby granted judgment against plaintiff.

Dated: MAR 18 1966

Albert C. Wollenberg
Judge of the United States
District Court

Appendix B

United States Court of Appeals
For the Ninth Circuit

Elisha Edwards, Appellant, vs. Pacific Fruit Express Company, Appellee.	No. 21,020

[May 10, 1967]

On Appeal from the United States District Court
for the Northern District of California

Before: Chambers, Hamley and Merrill,
Circuit Judges.

Per Curiam:

This is an appeal from a district court determination that Pacific Fruit Express Company (P.F.E.) is not a "common carrier by railroad." Appellant, an injured P.F.E. employee, claims that P.F.E. is such a common carrier. At stake is appellant's attempt to proceed under the Federal Employee's Liability Act, 45 U.S.C. 51, et seq.

P.F.E. is a large refrigerator car company. It owns approximately 25,000 refrigerator cars and carries about 28% of all refrigerated goods moving by rail.

P.F.E. deals directly with the shipper and, among other activities, maintains a service by which it keeps the shipper posted as to the whereabouts of its goods in transit, thus allowing the shipper to order goods diverted from one destination to another.

In asking this court to decide that P.F.E. is a "common carrier by railroad," appellant necessarily asks that we overrule the case of *Gaulden v. Southern Pac. Co.*, 78 F. Supp. 651 (N.D. Calif.), aff'd 174 F.2d 1022, which construed the term narrowly to exclude refrigerator car companies.* Were the slate clean, we might well be convinced by appellant's argument for a broader definition, but, as it is not, we choose to follow the unanimous line of authority and affirm. We note that since *Gaulden, supra,* was decided in 1949, Congress has not acted to bring refrigerator car company employees under F.E.L.A. protection.

Gaulden, supra, has been followed in *Hetman v. Fruit Growers Express Co.*, 3 Cir., 346 F.2d 947; *Moleton v. Union Pacific Co.*, 118 Ut. 107, 219 P.2d 1080, *cert. denied*, 340 U.S. 932; *Aguirre v. Southern Pac. Co.*, 232 Cal. App. 2d 636, 43 Cal. Rptr. 73.

In the Supreme Court of the United States

OCTOBER TERM—1967

No. 465

ELISHA EDWARDS,
Petitioner,

vs.

PACIFIC FRUIT EXPRESS COMPANY,
Respondent.

Brief for Respondent in Opposition

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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September 28, 1967

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

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OPINIONS BELOW

There is no opinion in the District Court. The opinion of the Court of Appeals is set forth in Appendix B of the Petition (p. iii), and is reported at 378 F2d 54.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Are refrigerator car companies "common carriers by railroad" within the meaning of the Federal Employers' Liability Act, 45 U.S.C. § 51 et seq.

NCR

CARD 3

STATUTE INVOLVED

The portion of the Federal Employers' Liability Act, 35 Stat. 65, 45 U.S.C. § 51 et seq. which is involved is the opening clause of § 51, which reads in part,

> Every common carrier by railroad . . . shall be liable in damages . . . .

STATEMENT

Petitioner Elisha Edwards, an employee of Pacific Fruit Express Company, was injured November 9, 1963, at Roseville, California. According to the Complaint, Edwards was injured while operating a "motor vehicle" on the premises of Respondent. (R. 1 through 3). Respondent Pacific Fruit Express Company is furnishing workmen's compensation benefits including medical care and hospitalization. (R. 37).

Complaint was filed November 24, 1965, alleging Respondent's status as a common carrier by railroad subject to the Federal Employers Liability Act (hereinafter sometimes referred to as F.E.L.A.). Shortly thereafter Respondent answered and filed a motion for summary judgment. (R. 10). The motion was supported by the affidavit of W. G. Cranmer, Assistant to the Vice President and General Manager of Pacific Fruit Express Company. The affidavit shows that Respondent Pacific Fruit Express Company is a refrigerator car company. Its business has two primary aspects: 1) It owns and rents to railroads a fleet of refrigerator cars and refrigerator trailers specially designed to hold perishable commodities, and 2) It furnishes protective services against heat or cold to commodities carried in the refrigerator vehicles. (R. 34) In brief, the affidavit shows that Pacific Fruit Express Company does not transport commodities, does not publish tariffs and does not issue bills of lading (R. 35). The affidavit shows that Pacific Fruit

Express Company does not directly or indirectly serve the shipping public, i.e. does not accept or receive commodities for transportation. (R. 35). It shows that Pacific Fruit Express Company has no system of tracks, no terminals, no rail motive power, etc., excepting only that it has a shop switch engine at Roseville, California and at Tucson, Arizona, and owns railroad tracks at those locations and at locations where it receives ice. (R. 34)

In opposition to the motion for summary judgment Petitioner offered a purported affidavit executed by an investigator for Petitioner's attorneys. This document asserted that the investigator had picked up certain advertising literature from the offices of Pacific Fruit Express Company and that the literature was attached to the affidavit. (R. 69) This so-called affidavit forms the main basis for Petitioner's extravagant and inaccurate characterization of Respondent's business.

ARGUMENT

I. There Is No Conflict of Decision.

Petitioner asserts the decision of the Court of Appeals conflicts with decisions of this Court and of other Federal and state courts. (Petition, p. 14).

Respondent submits that not only is the decision below not in conflict with decisions of this Court or of other circuits, but on the contrary the decision below is in accordance with the unanimous weight of authority, which holds that refrigerator car companies are not subject to the Federal Employers' Liability Act. There are no reported decisions with a contrary holding.

Petitioner asserts first that the decision below is in conflict with *Parden v. Terminal Railroad of Alabama Docks Dept.*, 377 U.S. 184; 84 Sup. Ct. 1207; 12 L. Ed 2d 233. A brief review of the *Parden* opinion will indicate the sole

question decided was as to the constitutional immunity of the State of Alabama. Accordingly, the *Parden* case is not a case which is "substantially indistinguishable" from the present case, and cannot represent a direct conflict. In addition, a reading of the briefs and opinion in *Parden* shows that the question of the Respondent's status as a common carrier by railroad was not challenged, and a ruling on that point was not necessary to the decision of the case. It cannot even be said, therefore, that the decision below represents a conflict with the reasoning of the *Parden* decision. The question posed here simply was not raised in *Parden*. Further, the *Parden* case involved a terminal railroad, i.e. a switching railroad which directly served on its own tracks with its own power and crews various docks and industries and physically interchanged cars with other railroads. As Cranmwer's affidavit shows, none of these factors are present in the business of Respondent, a refrigerator car company. The two situations are thus factually distinguishable.

Petitioner next asserts the decision below is in conflict with a line of cases which it designates as "the terminal company decisions." (Petition p. 18). The mere assertion that these cases deal with the activities of terminal railroad companies is enough to indicate they are factually distinguishable from the activities of refrigerator car companies. Thus, a fortiori there can be no conflicts between the two types of cases. As is shown hereafter, Congress and the courts have long recognized and accorded separate treatment to different areas of transportation activity which are peripheral to railroading. Petitioner offers no persuasive reason for overcoming this congressional and judicial recognition of differences, and in particular no reason is offered for assimilating the treatment of refrigerator car companies to that given terminal railroad companies.

Far from there being any conflict in decisions, the decision below is in accord with the prior decision of that court in *Gaulden v. Southern Pac. Co.*, 174 F.2d 1022 (9th Cir. 1949) which affirmed in a *per curiam* opinion the judgment of the District Court for the reasons stated in the opinion of the District Court, 78 F.Supp. 651 (N. D. Calif. 1948). The decision below is also in accord with that of the only other circuit to consider this question, the Third Circuit, in *Hetman v. Fruit Growers Express Co.*, 346 F.2d 947 (3rd Cir. 1965).

The decision below is in accordance with the only other reported decisions, those of state courts considering this question. These are:

1) *Aguirre v. Southern Pac. Co.*, 232 Cal. App. 2d 636; 43 Cal. Rptr. 73, and

2) *Moleton v. Union Pac. R. R. Co.*, 118 Ut. 107, 219 P.2d 1080, *cert. den.* 340 U.S. 932; 71 Sup. Ct. 495; 95 L. Ed. 672.

The judicial authority is thus unanimous, and not in conflict, to the effect that refrigerator car companies are not subject to the Federal Employers' Liability Act.

II. There Is No Unsettled or Important Question of Federal Law.

Firstly it should be noted this Court has previously declined to review this question in a case involving Respondent herein. *Moleton v. Union Pac. R.R.* 118 Ut. 107, 219 P.2d 1080, cert. den. 340 U.S. 932, 71 Sup. Ct. 495, 95 L. Ed. 672. In *Moleton* exactly the same question was raised, to wit: [whether]

> "The defendant Express Company at the time of plaintiff's injury was a common carrier by railroad in interstate commerce." (p. 1084)

The reference to "Express Company" is to Respondent herein, Pacific Fruit Express Company. Petitioner indicates

no changed facts or circumstances which invest the question with additional importance since the time of the *Moleton* decision.

Secondly, the law in this area has been well settled for many years. All the decided cases are adverse to Petitioner. The seminal case is *Gaulden v. So. Pac. Co.* 78 F.Supp. 651 (N.D. Calif.), and that decision is almost twenty years old. The cases relied upon by The Hon. Louis Goodman in the opinion in *Gaulden* (as holding that "the business of renting refrigerator cars to railroads or shippers and providing protective service . . . is not of itself that of a common carrier by railroad,") date from 1914 and are clear holdings within their fields. In the meantime:

> These employees have, during all of those years, been working under, and enjoying the benefits of workmen's compensation laws of California and of the other states in which P.F.E. operates (not the least of which benefits is compensation for all employment-induced health and accident casualties regardless of proof of negligence.) We would not lightly conclude that Congress, in the enactment of Section 55 of F.E.L.A., intended that the 4,000 employees of a large corporation now operating independently and legally and a non-railroad must suddenly be required to switch from the system of state workmen's compensation laws to the federal railroad employees system, a transfer inevitably fraught with hardship upon both employees and employer occasioned by readjustment. . . . . *Aguirre v. Southern Pac. Co.*, 232 Cal. App. 2d 636; 43 Cal. Rptr. 73.

III. The Decision Below Is Clearly Correct.

There are no significant factual changes in Respondent's operations from that shown in prior adjudications, notwithstanding Petitioner's attempts to make it appear otherwise. Petitioner asserts, for example, that Respondent "(c) holds itself out to the public as providing common carriage . . ."

(Petition p. 2). The basis for such an assertion appears to be the references to classified telephone directory listings set forth on page 10 of the Petition. This material is improperly offered in that it is not part of the record. Apart from that, listings in the yellow pages, which are obviously based on the phone companies' available classifications, are an insufficient basis for the assertion. From a factual standpoint the possibility of such a "holding out" is negatived by the showing that Respondent does not have the means of doing so, e.g. lacks certificates of public convenience, tariffs, bills of lading and all the other paraphernalia of common carriage. (R. 35) Petitioner's urgings as to other factors of Respondent's business involve similar corruptions of meaning, and by and large concern matters considered in prior adjudications and found to be not significant. As to the matter of owning tracks and switch engines at Roseville and Tucson, for instance, many large shippers, consignees and suppliers of rail equipment own intraplant systems of tracks and switch engines, yet are not subject to the F.E.L.A.

In the court below, in order to escape the impact of the *Gaulden* decision, Petitioner contended Respondent's operations were much different than that shown in *Gaulden*. (Appellant's Opening Brief pp. 10 and 12). Now Petitioner has abandoned that position and seeks to distinguish *Gaulden* on other grounds (Petition p. 15). Petitioner thus tacitly concedes that Respondent's business has not materially changed from that shown in prior adjudications (*Gaulden* et.al.) These adjudications uniformly hold that refrigerator car companies are not subject to the F.E.L.A.

More importantly, however, the history of the inclusion and exclusion of refrigerator car companies in the various transportation legislation shows that Congress never in-

tended this type of activity to be covered by the F.E.L.A. In brief, the history is this: In 1934 the Railway Labor Act, 45 U.S.C. § 151, was amended as to Section 1 to *specifically include* services "in connection with the . . . refrigeration or icing . . . of property transported by railroad." 48 Stat. 1185 (1934), 45 U.S.C. § 151. In 1937 Congress enacted the Railroad Retirement Act, 45 U.S.C. § 228a and the Railroad Retirement Tax Act, Internal Revenue Code of 1954 § 3231, incorporating a definition of the term "carrier" which *specifically included* companies performing services in connection with refrigeration or icing of railroad cars. The acts which preceded these two acts (and were held unconstitutional or were superseded by these acts) also specifically included refrigerator car companies as a distinct type of activity. In 1938 the Railroad Unemployment Insurance Act, 45 U.S.C. § 351, *specifically covered* companies performing services in connection with refrigeration or icing.

When the F.E.L.A. was amended, however, a different story ensued. In 1939 Congress amended the Federal Employers' Liability Act, 53 Stat. 1404. At that time it was proposed to broaden the coverage of the act to include express, freight forwarding, and sleeping car companies. S. Rep. 661, 76th Cong., 1st Sess. 2 (1939). This proposed amendment was defeated, thus disclosing congressional disinclination to extend the coverage of the F.E.L.A., although within the operating rail industry the coverage was considerably broadened. The fact that refrigerator car companies were not proposed to be included indicates the lack of any demand or expression of need for extension of the F.E.L.A. to this area of activity.

By contrast, in the Transportation Act of 1940, 54 Stat. 917 Congress added Section 20(6) to another major item of transportation legislation, the Interstate Commerce Act,

giving the Interstate Commerce Commission limited jurisdiction (for the first time) to inspect books and prescribe forms of account for refrigerator car companies. This amendment came after a train of authority which specifically held refrigerator car companies not to be subject to the Interstate Commerce Act. *Ellis v. Interstate Commerce Commission,* 237 U.S. 434; 355 Sup. Ct. 645; 59 L. Ed. 1036; *U. S. v. Fruit Growers Express,* 279 U.S. 363; 49 Sup. Ct. 374; 73 L. Ed. 739.

In summary, by amendment to the Railway Labor Act, and by original enactment in the Railroad Retirement Act, the Retirement Tax Act and the Railroad Unemployment Insurance Act, Congress specifically included refrigerator car companies within the scope of the legislation. Thereafter in the 1939 amendments to the F.E.L.A. Congress refused to extend coverage of that act to various activities closely associated with railroading. In 1940, after the F.E.L.A. amendments, Congress amended the Interstate Commerce Act to specifically confer limited powers over refrigerator car companies. This legislative history demonstrates Congress recognizes refrigerator car companies as a distinct type of activity and did not intend to subject them to the F.E.L.A.

Apart from Congressional intent, the unanimous weight of judicial reasoning agrees that it is not accurate to characterize refrigerator car companies as common carriers by railroad. These cases have previously been cited and it would serve no point to discuss each one. Each, however, expressly considers the question raised here and resolves it against Petitioner's position. *Gaulden v. So. Pac. Co.* 78 F. Supp. 651 is the key case. Petitioner seeks to avoid it by suggesting the question was not fully urged. This is refuted by the express and full consideration given by Judge Goodman commencing on page 654 of the opinion.

This Petition presents no new considerations, there are no conflicts in the decisions nor important or unsettled questions of federal law, and statutory history and unanimous judicial opinion show the decision below is clearly correct.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

ALAN C. FURTH

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1967

No. 465

ELISHA EDWARDS,
Petitioner,

vs.

PACIFIC FRUIT EXPRESS COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

A. RESPONDENT'S OPERATIONS ARE THOSE OF A COMMON CARRIER BY RAILROAD.

That Pacific Fruit Express issues no bills of lading or publishes no tariffs is meaningless in an inquiry addressed to respondent's status under the Federal Employers' Liability Act. In *United States v. California,* 297 U.S. 175 (1936), this Court determined that a terminal railroad was a common carrier by railroad engaged in interstate commerce, notwith-

standing the fact that it issued no bills of lading, was not a party to through rates, dealt only with the delivering or receiving carrier, and maintained no freight station. The absence of any reference to transportation of goods, issuance of bills of lading, or publication of tariffs, in the definition of a common carrier by railroad enunciated in *Parden v. Terminal R. of Alabama Docks Dept.*, 377 U.S. 184, 185 (1965), virtually erases these peripheral elements from consideration in applying the Employers' Liability Act.

The direct pronouncement of this Court in *Parden* must not be lightly dismissed since it specifies in unambiguous language the activities which include a railroad operation within the F.E.L.A. and the broad reach with which that Act is endowed through the words "common carrier by railroad." Respondent scorns the paramount importance of the *Parden* decision which lies both in this Court's most current exegesis of the clear Congressional desire to "cover all rail carriers that constitutionally could be covered" (377 U.S. at 187 n. 5) and the repeated insistence by this Court that the F.E.L.A. be applied uniformly. Since this Court has never addressed itself to the specific question posed by this Petition[1]—and moreover since the Employers' Liability Act sets no precise standards to determine what businesses are common

[1]Respondent imprudently urges upon this Court a suggestion that some significance should be attached to the denial of certiorari in *Moleton v. Union Pacific R.R. Co.*, 118 Utah 107, 219 P.2d 1080 (1950), *cert. den.* 340 U.S. 932 (1951). To the contrary, this Court has on innumerable occasions admonished the bar that a denial of certiorari must not be construed to be an expression on the merits. *See, e.g., Politis v. United States*, 364 U.S. 426, 433 (1960); *House*

carriers by railroad, such contemporary utterances as *Parden* are the only valid measure in determining the true nature and full significance of respondent's operations. Pacific Fruit Express makes no effort to propound any authority as more definitive than *Parden;* nor does respondent dispute that it engages in essentially the same activities used in that opinion to characterize the common carrier by railroad.

Respondent essentially attacks the *Parden* decision because the characterization of the terminal company as a common carrier by rail was so readily apparent that it was veritably unchallenged. Rather than giving comfort to respondent, however, the ease of classifying the business operations of the Alabama terminal company as those of a common carrier by railroad would suggest that P.F.E.—which possesses the same characteristics—should be determined to be such a carrier with equal dispatch. A realistic appraisal compels the observation that the general nature of the activities is the same, the hazards to be apprehended in both cases are the same, the uniquely railroad character of the enterprises is the same, and the importance of the enterprises within the railroad industry is the same. Thus the principles to be applied must be the same. The definitional language of *Parden* was an essential prerequisite to the application of the

v. Mayo, 324 U.S. 42, 48 (1944), and cases cited therein. Furthermore, the chief issue in *Moleton* was whether the contract between respondent and its owners violated 45 U.S.C. §55, prohibiting contracts to evade the F.E.L.A. Petitioner, having for the first time amassed and presented the evidence establishing that P.F.E. is a common carrier in its own right, has no need to urge the argument to which *Moleton,* and all the other cases involving respondent, were addressed.

F.E.L.A. in that case and is undeniably the best yardstick to take the measure of respondent herein.[2]

While not dispositive of this case as an isolated fact, respondent's operation of refrigerated vans in addition to railroad cars (R. 73-74) evidences an effort by respondent to offer broad transportation service to the public. Pacific Fruit Express distinctly does not restrict its business to the renting and servicing of refrigerator cars for operating railroads. Respondent's car distribution, diversion and passing operations (R. 74) establish the plain fact of *control* which respondent exerts over the interstate carriage of goods by rail, much if respondent itself were providing the motive power of each of the trains. P.F.E.'s claim that it is limited to merchandising merely an auxiliary or static service to the common carriage industry is thus negated. Respondent's own description of itself as a "railroad company" in various telephone directories or as "the *first family of perishable transportation*" (R. 70) adds to the total picture and invalidates the fictitious posture which

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[2]It is noteworthy that companies seeking a harsh and limited application of the F.E.L.A. in the past have invariably urged upon the courts the narrow and circuitous *obiter* of *Wells Fargo v. Taylor*, 254 U.S. 175, 187 (1920), upon which rested the decision in *Gaulden v. Southern Pacific*, 78 F.Supp. 657 (N.D. Calif. 1948), *aff'd* 174 F.2d 1022 (9th Cir. 1949). The crucial differences between *Wells Fargo* and *Parden* are several. While *Parden* undertook a detailed analysis of the significant indicia of railroad common carriers under the F.E.L.A., *Wells Fargo* offered only an obscure conclusion which has not been utilized by this Court for decades. Secondly, the very enterprises under consideration in *Wells Fargo* have since been held to be common carriers, escaping the F.E.L.A. only because of a lack of railroad equipment. (See discussion and cases cited at Petition p. 21 fn. 38.)

respondent seeks to assume before the courts.[3] It is manifestly the cumulative nature of this enterprise which must control in characterizing Pacific Fruit Express as a railroad company.

Solely by innuendo, respondent disparages its own publications which constitute the body of evidence offered by petitioner in the District Court. It is to be observed that these materials which, respondent asserts, form the "main basis for Petitioner's extravagant and inaccurate characterization of Respondent's business" (Brief for Respondent in Opposition, p. 3) were introduced without objection in the District Court, are undeniably authentic P.F.E. publications (a fact undisputed by respondent),[4] were used by respondent before the Court of Appeals to describe its

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[3]Against all of the indicia of railroad operations, respondent sets up only the affidavit of W. G. Cranmer of the Office of the Vice President and General Manager of P.F.E. From this conclusion-riddled statement, it would be necessary to distill extremely favorable inferences in order to reach the result demanded by Pacific Fruit Express. Aside from the fact that the statement is not reasonably susceptible of such liberal reading, the elementary principles governing summary judgment proceedings require that all inferences be drawn *against* the moving party. *Cochran v. United States*, 123 F.Supp. 362, 364 (D.C. Conn. 1954); Wright, Handbook of the Law of Federal Courts 388, §99 (1963); California Continuing Education of the Bar (Practice Handbook No. 15), Federal Civil Practice 380, §4.41 (1961).

[4]Advertisements—by railroad companies specifically—have been found to constitute admissions against interest to be treated the same as any other such declaration; such evidence is not rendered any less competent by a contention that it was only an advertisement to catch the credulous public. *Southern Pacific v. Godfrey*, 48 Tex.Civ.App. 616, 621, 107 S.W. 1135 (1908); *Southern Pacific v. Allen*, 48 Tex.Civ.App. 66, 106 S.W. 441 (1907); *cf. Lynch v. Bekins Van & Storage*, 31 Cal.App. 68, 159 Pac. 822 (1916); *Stringer v. Davis*, 35 Cal. 25 (1868).

own activities,[5] and effectively expose the insufficiency of the affidavit of W. G. Cranmer offered on behalf of respondent.[6] In the same vein, the telephone directory advertising of respondent also constitutes material and competent evidence of the nature of its operation.[7] Since the task of characterizing a business activity must by necessity hinge upon the relationship between the company in question and the public with which it engages, such evidence as may be furnished by

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[5]"The matter of car distribution services is explained more fully in the literature attached to the declaration of Leland P. Jarnigin (T.R. 69)." Respondent then proceeded to reprint verbatim a portion of R. 74. (Appellee's Brief p. 13.)

[6]One cannot but be intrigued by the fact that the mimeographed narrative describing respondent's operations (R. 71-75) concludes with the notation "Office of Vice President & General Manager/ San Francisco, California/March 1, 1963" and is therefore a publication of Mr. Cranmer's own office. (R. 34.) Since Mr. Cranmer executed substantially the same statement in *Aguirre v. Southern Pacific*, 232 Cal.App.2d 636, 43 Cal.Rptr. 73 (1964), as was introduced by respondent in the District Court herein, it appears that the Office of the Vice President and General Manager of Pacific Fruit Express was contemporaneously issuing conflicting documents.

[7]"We are of the opinion . . . that the fact that the regular issues of the directory of the telephone company are 'brought home to the public' is a matter of such common knowledge that there was no necessity for testimony with respect thereto." *Barron v. Board of Dental Examiners*, 44 Cal.App.2d 790, 795, 113 P.2d 247 (1941), upholding the administrative suspension of a dentist's license to practice because of advertising appearing in the telephone directory. The use of telephone directory listing as corroborating evidence is not novel. *See e.g. Arrow Aviation v. Moore*, 266 F.2d 488 (8th Cir. 1959); *Hood v. Bekins Van & Storage*, 178 Cal. 150, 172 Pac. 594 (1918). Moreover, since a federal court at an appellate level may notice judicially facts which are generally known or observable, *Mills v. Denver Tramway Corp.*, 155 F.2d 808 (1946), the existence of certain words in books in general circulation and readily available for inspection by any member of the general public is properly brought to a court's attention.

commercial publications or advertising must logically be highly influential.[8]

Fundamentally, respondent has grounded its entire argument upon *Gaulden v. Southern Pacific Co.*, 78 F.Supp. 651 (N.D. Calif. 1948), *aff'd* 174 F.2d 1022 (9th Cir. 1949). In doing so, respondent has totally ignored the great factual differences between the Record in *Gaulden* (2555 Records of the U.S. Circuit Court of Appeals, Number 12062) and the Record before this Court.[9] More important, however, is the

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[8]Respondent's implied criticism of "the phone companies' available classifications" (Brief for Respondent in Opposition p. 7) is without merit. Respondent is not compelled to purchase any advertising in the classified telephone directory—especially if it does not endeavor to solicit business from the general public. Secondly, it is obvious that telephone companies must assign their classified headings in a manner consistent with commercial usage. Thirdly, and most elementary, there are alternatives available to respondent should it desire a different directory classification. For example, in the San Francisco classified telephone directory of September, 1967, at page 808 there exists presently a listing for "Railroad Car Leasing" which would appear far more consistent with the position that respondent urges upon this Court than the heading "Railroad Companies."

[9]A cursory comparison of the *Gaulden* file shows the Record herein to contain far more factual detail describing respondent's activities. In addition, contrary to respondent's claim, petitioner has not "abandoned" the argument that respondent's operations are significantly different from those detailed in *Gaulden*. The variances are obvious. For example, the *Gaulden* opinion described respondent in the following terms:

> The shippers specify to the carrier, in writing, the type of service desired; they may, by written order, change the type of service originally requested . . . . The shipper's orders are transmitted by the carrier to the Pacific Fruit Express Company . . . [which] transacts none of its protective service business directly with the shippers. 78 F. Supp. at 654.

In contrast to this, respondent uses the following language to explain its contact with the shipper:

> . . . if after valuable produce is loaded into a car and it is started on its way to the consuming center, . . . it is learned that another area has better demand and offers a better price, *the shipper will call us on the telephone and request that we*

fact that respondent in resting upon *Gaulden* insists upon a narrow and restrictive construction of the Federal Employers' Liability Act, a statute which is to be given broad and remedial application.

Respondent has thus carefully avoided meeting the central issues raised by the Petition. It actually cannot be ascertained from respondent's brief whether it protests the classification "common carrier by railroad" or simply "common carrier," since respondent never addresses itself directly to the operative statutory language in the context of its commercial operations. Since P.F.E. unquestionably functions exclusively upon a highway of steel rails using equipment and appurtenances uniquely found in the railroad industry, Pacific Fruit Express cannot reasonably avoid the characterization "railroad." Moreover, both in law and in fact, P.F.E. is a common carrier; respondent neither disputes the evidence of its involvement with and control over the movement of commodities in interstate commerce nor proposes any decisional authority to suggest that it is other than an interstate carrier.

B. RESPONDENT MISCONSTRUES THE ENTIRE BODY OF FEDERAL LEGISLATION APPLICABLE TO THE RAILROAD INDUSTRY.

Congress has never altered the basic qualifying language of the Employers' Liability Act, "common

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"divert" the car from its originally billed destination to the new destination . . . . In handling some 285,000 carloads of perishables a year we are called upon *by shippers* to accomplish in the neighborhood of 170,000 diversions a year . . . . and *we keep shippers informed* when their shipments "pass" certain points . . . . (R. 74-75, italics added.)

carrier by railroad." At various times in amending the Act, Congress has added to the protection of railroad workingmen by modernizing the applicable federal substantive law[10] and clarifying the determination of whether or not a particular activity was in interstate commerce for F.E.L.A. purposes.[11] In view of the fact that the question of including refrigerator car operations under the F.E.L.A. first arose in *Gaulden v. Southern Pacific Co., supra,* 78 F.Supp. 651 (N.D. Calif. 1948), it is patently unreasonable to place any construction in this regard on any earlier action—or inaction—of Congress. At best, the doctrine of legislative acquiescence is only an "auxiliary tool for use in interpreting ambiguous statutory provisions . . ." *Jones v. Liberty Glass Co.,* 332 U.S. 524, 533 (1947). It should not properly be resorted to in a situation where Congress was confronted with neither judicial decision nor commercial tradition in which

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[10]E.g., abolishing the defense of assumption of the risk in F.E.L.A. cases. 53 Stat. 1404 (1939). It should not be forgotten that one of the most significant features of the Employers' Liability Act is its uniformity achieved through the required application of federal statutory and decisional law exclusively in substantive matters. *Jacobs v. Reading Co.,* 130 F.2d 612, 614 (3d Cir. 1942).

[11]53 Stat. 1404, the amendment of 1939. Respondent in referring to S. Rep. 661, 76th Cong., 1st Sess. 2 (1939) alleges that a "proposed amendment was defeated . . . ." (Brief for Respondent in Opposition p. 8.) In fact Senate Report 661, which was submitted by a single Senator, states only that the particular provision was "excluded from the substitute" bill since neither "necessity nor demand" for the specific inclusion of express, freight forwarding or sleeping-car companies had been found. Such an ambiguous report is of dubious value; committee reports are of value only where the meaning of a statute is doubtful and the report resolves, rather than creating, an ambiguity. *United States v. Shreveport Grain & Elevator Co.,* 287 U.S. 77 (1932).

to acquiesce and where the paramount directive of Congress is undisputable.

The entire body of federal legislation regulating and defining the railroad industry must be understood as a whole. What is a railroad for one segment of this Congressional scheme should logically be a railroad for all other purposes under these acts. Congress in 1906, in amending one of the most comprehensive of legislative programs, provided a practical series of definitions for the terms applicable herein in the Interstate Commerce Act. 34 Stat. 584, 49 U.S.C. § 1. The Act applies, inter alia, to "common carriers engaged in the transportation of passengers or property wholly by railroad. . . ." *Id.* at § 1(a). All instrumentalities used in the transportation of persons or goods by rail are included within the term "railroad." *Id.* at § 1(3). "Transportation" as used in the Act specifically includes "refrigeration or icing," *id.*, activities which have traditionally been an essential factor in the common carriage of goods by rail. See *Alton & S. R. v. United States,* 49 F.2d 414 (N.D. Calif. 1931). The Interstate Commerce Act does not, on its face, purport to control the breadth of the F.E.L.A., but it is indeed important to observe that the language used is strikingly similar.

The Interstate Commerce Act has been linked directly to the Employers' Liability Act. The Railway Labor Act, 48 Stat. 1185, 45 U.S.C. §151 et seq., specifically adopts the same definition of common carrier as it found in the Interstate Commerce Act. With only occasional minor variation in phrasing,

the same broad concepts of common carrier, transportation, and railroad appear in every statute in Titles 45 and 49 defining or explaining those terms. Compare Railroad Retirement Act, 50 Stat. 307, 45 U.S.C. §228, or Railroad Unemployment Insurance Act, 44 Stat. 587, 45 U.S.C. §351, as but two examples.

The direct tie between the Interstate Commerce Act and the F.E.L.A. is found in the construction of the Federal Safety Appliance Act, 27 Stat. 531, 45 U.S.C. §1 et seq. The Safety Appliance Act has been held to be at least as broad in its application as the I.C.A. but was not limited by the requirement of the latter regarding "a continuous carriage or shipment." *Pacific Coast Ry. Co. v. United States,* 173 Fed. 448 (9th Cir. 1909). The Safety Appliance Act, on the other hand, is essentially *in pari materia* with the F.E.L.A., is viewed as a series of amendments to the F.E.L.A., and definitely expands the rights and protection given to persons employed in interstate rail commerce. *Urie v. Thompson,* 337 U.S. 163 (1949).

Petitioner does not dispute the fact that Congress has expressed an awareness of the fact that certain companies deal with refrigeration of rolling stock. Rather than mitigating against inclusion of respondent with the F.E.L.A., however, this fact has the opposite effect. As the court in *Bush v. Brooklyn Eastern District Terminal,* 218 N.Y.S. 516, 517, 218 App.Div. 782 (1926), reasoned in a terminal company action:

> We think it was necessary to decide that the defendant was a common carrier by railroad in order to apply to it the Hours of Service Act, as

> was done by the United States Supreme Court . . . . We think it could not be a common carrier within that act, and not be a common carrier within the provisions of the FELA.

Since respondent must comply with the Federal Safety Appliance Act, see *Pacific Fruit Express v. McColgan,* 67 Cal.App.2d 93, 97, 153 P.2d 607 (1944), there can be no logic in excluding application of the F.E.L.A. in view of respondent's extensive activities in the carriage of goods. Respondent places a construction upon Congressional activity in the area of railroad legislation which suggests a definite Congressional intent to create conflict and inconsistency in this field. In view of the fact that the Federal Employers' Liability Act does not exist in a vacuum but is a part of a comprehensive legislative program, it is highly unlikely that Congress intended to project ambiguity into this area.

Respondent seeks to deny petitioner the federal remedy which was designed to compensate for injuries resulting from the very hazards to which petitioner and his thousands of co-workers are exposed in their employment by Pacific Fruit Express Company. The fact that P.F.E. attempts to restrict its California employees to an administrative compensation program (workmen's compensation) has no effect on this case, *cf. Carroll v. Lanza,* 349 U.S. 408 (1955), is not properly evidence of the nature of respondent's activities, *cf. Tipton v. Socony Mobil Oil Co.,* 375 U.S. 34 (1963), and does not accurately state P.F.E.'s exposure to damage actions in the various states in which it does

business.[12] Any necessary "readjustment" would involve no more than an alteration in the policies of liability insurance coverage purchased by respondent. As such respondent's reference to the temporary disability payments made to petitioner can only be intended to divert the attention of this Court from the central issue herein: can a company which *acts* as a common carrier by railroad, *characterizes* itself as a transporter of freight by railroad in interstate commerce, and *holds itself out* to the general public as a railroad company, logically immunize itself from the Federal Employers' Liability Act?

CONCLUSION

It is respectfully submitted that respondent has failed to offer any sound reasons against the issuance of a writ of certiorari in this case and that, for the reasons stated in the Petition, this petition for a writ of certiorari should be granted.

Dated, San Francisco, California,
October 5, 1967.

Respectfully submitted,
DAVID S. LEVINSON,
Attorney for Petitioner.

ARNE WERCHICK,
JACK H. WERCHICK,
Of Counsel.

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[12] In several jurisdictions, administrative compensation programs are optional and may be waived in favor of civil actions against an employer. *See*, for example, Ariz. Rev. Stats. §23-906, Kansas Stats. Anno. §44-543, Nebraska Rev. Stats. §48-112.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1967

No. 465

ELISHA EDWARDS,
Petitioner,

vs.

PACIFIC FRUIT EXPRESS COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE PETITIONER

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The memorandum order of the United States District Court for the Northern District of California granting summary judgment for respondent, dated March 18, 1966, is unreported and is reproduced on pages 51-52 of the printed Appendix. The opinion of the Court of Appeals for the Ninth Circuit is reported in 378 F.2d 54 and is reproduced on pages 53-54 of the printed Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on May 10, 1967. Petitioner did not seek a rehearing before that court. On July 28, 1967, by order of Mr. Justice White, the time within which to file a petition for a writ of certiorari was extended to September 1, 1967. The petition was filed on August 7, 1967, and was granted on October 23, 1967. The jurisdiction of this Court rests on 28 U.S.C. §1254 (1).

STATUTE INVOLVED

This case turns upon the construction of Section 1 of the Federal Employers' Liability Act, 53 Stat. 1404, 45 U.S.C. §51, which provides:

> Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or

by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

QUESTION PRESENTED

Is Pacific Fruit Express Company a "common carrier by railroad" and therefore subject to liability under the Federal Employers' Liability Act where:

(a) it owns, controls, operates and services the largest fleet of refrigerated railroad cars and trailers in the United States;

(b) it controls the movement of its cars in transit;

(c) it holds itself out to the public as providing common carriage of perishable commodities by rail;

(d) it owns extensive railroad terminal, service and repair properties and facilities;

(e) it owns railroad tracks and locomotives which it uses in its operations;

(f) it is required to report its financial data to the Interstate Commerce Commission, using a form of accounts prescribed by the I.C.C.;

(g) it is required to maintain its railroad equipment in compliance with the Federal Safety Appliance Act and is subject to the Railway Labor Act, the Railroad Retirement Act, and the Railroad Unemployment Insurance Act;

(h) it charges for the use of its railroad cars on the basis of the *distance* goods are carried in its cars;

(i) its employees are continuously exposed to the identical hazards faced by employees of operating railroads generally; and,

(j) it engages solely in operations having to do with the carriage of goods by railroad?

STATEMENT OF THE CASE

This action arises under the Federal Employers' Liability Act and seeks damages for injuries caused petitioner, Elisha Edwards, while acting in the course of his employment by respondent, Pacific Fruit Express Company (P.F.E.), at Roseville, California. The complaint (A. 1-4) reflects that on November 9, 1963, petitioner was employed by respondent in furtherance of respondent's interstate commerce operations; because of the careless and negligent maintenance of appliances and premises by respondent, petitioner was seriously and permanently injured when he was en-

veloped by burning gasoline; as a result, petitioner is disabled and disfigured and has prayed for general damages in the sum of One Million Dollars in addition to his special damages. Respondent's answer (A. 4-7) admits that it is a Utah corporation acting in interstate commerce; that petitioner was employed by respondent at the time of the accident; that petitioner was injured in the course of his employment;[1] and that it has in fact been necessary for petitioner to receive an as yet undetermined amount of medical care for his injuries. The employment in which petitioner was engaged when he sustained these injuries involved making respondent's railroad freight cars ready for the transportation of perishable commodities in interstate commerce by railroad. (A. 22.)

Shortly after interposing its answer, respondent moved for summary judgment (A. 8), alleging immunity from liability under the Federal Employers' Liability Act as a matter of law, and the district court on March 18, 1966, granted the motion after concluding that Pacific Fruit Express Company is not a "common carrier by railroad." (A. 51-52.) Because judgment occurred in the infancy of this litigation, the record is of necessity fragmentary and is primarily

[1]This follows from respondent's Sixth Affirmative Defense (A. 6-7) alleging payment of temporary workmen's compensation benefits for which the employment relationship to injury would be a prerequisite to the application of California Labor Code § 3201 et seq. (industrial accident compensation).

concerned with facts showing the actual nature of respondent's operations.[2]

Pacific Fruit Express is "one of the oldest refrigerator car companies" in the United States.[3] It engages some four thousand employees (A. 41), most—if not all—of whom have joined railroad labor unions formed as "brotherhoods" with which P.F.E. has entered into collective bargaining agreements.[4] Respondent owns, controls, operates and services the largest

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[2]Verbatim extracts from the appendix set out in this brief to describe respondent's business activities come solely from documents authored by respondent unless specifically noted to the contrary. In fact, all data in the original record illustrating respondent's activities were obtained from the hand of respondent, i.e., its affidavit supporting the motion for summary judgment (A. 18-23) and the publications introduced below by petitioner (A. 37-50), the origin and authenticity of which are not disputed by respondent. The publications are informally obtained advertising literature but are nevertheless admissible in evidence against respondent (Rule 43(a), Federal Rules of Civil Procedure; California Evidence Code §§ 1220-1222, incorporating the provisions of former California Code of Civil Procedure § 1870(2)) and, having been introduced in the district court without objection, they constitute material which may properly be used against respondent.

[3]Since its organization in 1907, P.F.E.'s sole shareholders have been Union Pacific Railroad Company and Southern Pacific Company. (A. 18.) Respondent maintains that there are no joint managerial or labor force employees.

[4]Respondent so advised the district court in its affidavit filed in *Gaulden v. Southern Pacific Co.*, 78 F.Supp. 651 (N.D. Calif. 1948), aff'd 174 F.2d 1022 (9th Cir. 1949). See 2555 Records of the U.S. Court of Appeals, Number 12062, TR 34. Respondent still maintains the same labor arrangements and deals with a railroad clerical brotherhood of which petitioner was a member at the time of the accident. See the Motion and Brief on behalf of *Amici Curiae* Brotherhood of Railway Carmen of America, Brotherhood of Railway, Airline and Steamship Clerks etc., and the Switchmen's Union of North America for illustrations of the type of work done by P.F.E. employees represented by railroad Brotherhoods.

fleet of refrigerated railroad cars and trailers in the United States, consisting of twenty-five thousand three hundred refrigerator boxcars, 2730 mechanical cars, and 1000 "Ice-Tempco" cars[5] (A. 40) and constituting essentially thirty per cent of the refrigerated railroad rolling stock in the nation.[6] Respondent aptly describes itself as "the nation's largest operator of refrigerated rail cars." (A. 40.)

Rail deliveries of perishable commodities which require protection against heat and cold "were handled by railroads even as far back as 100 years ago" (A. 41) and do not represent a modern innovation in the railroad industry. An estimated one million railroad carloads of perishable commodities now move in the United States every year, and Pacific Fruit Express "originates and otherwise handles about 280,000 car-

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[5]"Ice-Tempco" refers to the presence in the freight cars of "units for constant operation of air-circulating fans while under load to produce controlled temperatures." (A. 46.) The continuous involvement of P.F.E. with the commodities while being transported is further illustrated by the fact that P.F.E. also advertises "TEMPCO-VAN SERVICE" involving ownership and use of 400 refrigerated highway trailer-containers for receipt and delivery of goods and 200 "piggyback" rail flat cars to carry the containers. (A. 37.)

[6]Respondent during the year 1965 also operated 1946 refrigerator cars and 474 flat cars leased from the Southern Pacific Company and 1742 refrigerator cars and 474 flat cars leased from the Union Pacific Railroad Company. Interstate Commerce Commission, Annual Reports, *Transport Statistics in the United States*, Part 9, p. 7 (for the year ending December 31, 1965) [hereinafter cited as I.C.C. Transport Statistics]. It is unknown whether these leased cars are reflected in the figures cited above as published by respondent or whether they represent an additional aspect of respondent's railway car operations. In any event, respondent operates rolling stock owned by operating rail carriers as well as its own cars.

loads or approximately 28% of the nation's total."[7] (A. 42.) Respondent is able "to handle all kinds of perishable foodstuffs and other commodities from and to every part of the country" (A. 42) as well as controlling the movement, direction and handling of cars in transit under what are termed its "Car Service Operations."[8] Pacific Fruit Express advises shippers that

> TEMPCO-VANS, the most modern trailers designed especially for combination highway and piggyback operation, are the latest addition to PFE's *first family of perishable transportation.*

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[7]In 1965 the Interstate Commerce Commission listed seven refrigerator car lines owned or controlled by American railroads. I.C.C. Transport Statistics, *supra* note 6. Using the figures provided therein, it appears that Pacific Fruit Express accounted for approximately 46% of the operating revenues, 52% of the mileage made by owned cars and 51% of the employees in the refrigerator car subdivision of the railroad industry. The record is silent regarding the organizational structure or actual operations of any of the six smaller refrigerated freight rail lines. It is known, however, that in at least one important particular P.F.E.'s transportation activities are considerably more extensive than those of Fruit Growers Express. F.G.E. is the second largest of the refrigerator rail companies owned or controlled by railroads, *id.*, but does *not* service its rolling stock. Rather it simply leases its cars while an independently contracted company ices and otherwise services the railroad cars. See *Hetman v. Fruit Growers Express Co.*, 346 F.2d 947 (3d Cir. 1965), which must therefore be distinguished from the present case.

[8]These consist "in large part of car distribution, the furnishing of commodity protective services as ordered by the shipper, and . . . diversion and passing service." (A. 48.) Car distribution "involves the provision of cars at proper places at the proper times" in condition to transport perishables. Diversion operations are explained as involving the rerouting of freight cars by respondent whenever the shipper calls P.F.E. to request a change in destination; passing service involves notification to the shipper by P.F.E. of the precise location of each car bearing the shipper's goods.

> Shippers and consignees want their shipments transported speedily and smoothly *and delivered to the market in top condition.*[9]

Respondent advertises, moreover, that it has "Offices and Agencies in all principal Western producing areas" and in "all major receiving and consuming areas." (A. 40.)

Respondent describes its own *en route* services in a manner most suggestive of a kinetic carriage activity as distinguished from a static and limited rental and ice service:

> [Refrigerator trailers and cars] are used for frozen foods as well as fresh fruits and vegetables and add to the many other features of PFE service the convenience of pick-up and delivery. (A. 47.)
>
> . . . [I]f after valuable produce is loaded into a car and it is started on its way to the consuming center, . . . it is learned that another area has better demand and offers a better price, the shipper will call us on the telephone and request that we "divert" the car from its originally billed destination to the new destination. . . . In handling some 285,000 carloads of perishables a year we are called upon by shippers to accomplish in the neighborhood of 170,000 diversions a year. . . . We have sizable diversion forces at Chicago . . . [which] are aware at all times where each and every loaded car may be and we keep shippers

[9] A. 37. Respondent itself has provided these italics in the original publication, thereby deliberately emphasizing the carriage of goods as opposed to the servicing of rail cars.

> informed when their shipments "pass" certain points. . . . (A. 49-50.)

In 1965 P.F.E.'s cars accounted for over one billion miles of railroad car movement in the United States.[10]

All of respondent's rolling stock illustrated in its brochures (*e.g.*, A. 37, 40, opposite 50), and also plainly visible to passersby on railroad or highways, clearly bears respondent's name, while the insignia of its owners appear in distinctly subordinate detail. The public, moreover, is exhorted to contact P.F.E. directly "for the finest in perishable transportation service throughout America" since respondent maintains "offices in principal cities to supply your needs fast—wherever you are." (A. 40.) Perhaps most revealing is the fact that P.F.E. facilitates direct contact with the consumer by holding itself out to the public in major cities across the United States as a carrier by railroad. A random sampling revealed that Pacific Fruit Express is listed—under its own corporate name—in the recent classified telephone directories of Minneapolis,[11] Omaha,[12] Sacramento,[13] and

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[10] I.C.C. Transport Statistics, *supra* note 6. By comparison, in 1962 the estimated total freight car-miles by all "Class I railroads" (traditional railroad corporations having annual operating revenues of $3 million or more, excluding terminal companies, switching roads, and small railroad companies) was approximately twenty-seven billion miles. U.S. Dept. of Commerce, *Statistical Abstract of the United States* (1963), No. 787, p. 579.

[11] p. 557 (November, 1966).

[12] p. 333 (1966).

[13] p. 576 (January, 1967). Petitioner's injuries were sustained at respondent's terminal located but a short distance from Sacramento, California.

San Francisco[14] under the index heading *"Railroad Companies"* and of Chicago,[15] Cincinnati,[16] Cleveland,[17] Denver,[18] Detroit,[19] Kansas City (Kansas and Missouri),[20] Pittsburgh,[21] Portland (Oregon),[22] Salt Lake City,[23] Seattle,[24] and Tucson[25] under the heading *"Railroads"*.

Pacific Fruit Express owns extensive terminal and service properties and facilities, none of which is or was wholly or partially owned by Southern Pacific or Union Pacific, respondent's owners. (A. 19.) Respondent maintains and operates five car shops at which railroad freight cars are built and repaired at various locations in the United States and has supplemental light repair and cleaning stations at a number of locations throughout the western states.[26] (A. 43.) Respondent operates eleven ice manufacturing plants nationally and also purchases ice from other

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[14]p. 761 (1966).

[15]p. 1650 (1966).

[16]p. 534 (June, 1966).

[17]p. 809 (April, 1966).

[18]p. 643 (July, 1966).

[19]p. 1164 (September, 1966).

[20]p. 620 (February, 1967).

[21]p. 636 (December, 1966).

[22]p. 629 (1966-1967).

[23]p. 356 (June, 1966). This, it should be noted, is respondent's state of incorporation.

[24]p. 584 (March, 1966).

[25]p. 319 (June, 1966).

[26]Common carriers by railroad, it appears, characteristically maintain and operate facilities for the construction and repair of their own stock. Cf. *Southern Pacific Co. v. Gileo*, 351 U.S. 493 (1955).

commercial concerns to meet its refrigeration demands. (A. 43.) *Deliveries of ice are made on railroad tracks owned by respondent, and repairs are accomplished by hauling cars over tracks owned by P.F.E. by means of locomotives also owned by respondent.* (A. 21-22.) Respondent is not only required to operate and maintain its own railroad equipment in compliance with the Federal Safety Appliance Act[27] but also undertakes to repair railroad equipment owned by other companies at P.F.E. maintenance facilities.[28]

Respondent's revenues are generated by charging rates varying from 4.5 to 5.25 cents per mile for the use of each of its railway cars.[29] (A. 19.) Respondent's primary fees, therefore, are regularly based not on the providing of refrigeration service to a particular company for a specified term, nor on the length of service of a railroad car, nor on the actual cost of providing the services, but directly on the distance of the carriage of goods.[30] Respondent "files financial data with

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[27]27 Stat. 531, 45 U.S.C. §1 et seq. This fact was found and reported by the California District Court of Appeal in *Pacific Fruit Express v. McColgan*, 67 Cal.App.2d 93, 97, 153 P.2d 607 (1944). That court also noted that maintenance and repair of respondent's railroad cars was accomplished both at its own facilities and, occasionally, at railroad repair shops owned by other companies. *Id.*

[28]See findings of facts by the district court in *Gaulden v. Southern Pacific Co., supra*, 78 F.Supp. 651, 654.

[29]*Id.* Respondent may on occasion lease a refrigerator car directly to a shipper on a monthly basis. (The rental rate would presumably not include income from special services in the icing or refrigeration of cars belonging to other companies or from the repair of cars of other carriers.)

[30]The fact that respondent customarily issues no bill of lading or statement of charges directly to the shipper but instead relies upon contracting carriers to collect and forward its revenues is

the Interstate Commerce Commission" which also prescribes the form of accounts to be used by respondent. (A. 20.) P.F.E.'s contracts are subject to approval by the I.C.C. before becoming operative,[31] thereby giving the Commission de facto regulatory authority over respondent's rates and services.[32] Conversely, Pacific Fruit Express "does not report to the California Public Utilities Commission, nor to any other state utilities commission." (A. 20.)

The district court believed that the Federal Employers' Liability Act does not embrace respondent's operations as reflected by the record herein. In its very brief opinion the Court of Appeals drew the following factual conclusions:

> P.F.E. is a large refrigerator car company. It owns approximately 25,000 refrigerator cars and carries about 28% of all refrigerated goods mov-

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immaterial to any of the issues in this action. See *Union Stockyard v. United States*, 308 U.S. 213 (1939), and *United States v. California*, 297 U.S. 175 (1936) where the operations in question were found to be common carriers by railroad notwithstanding the fact that *all* of their services and charges were rendered solely and directly to railroad companies and in no respect to the general public.

[31] *Gaulden v. Southern Pacific Co., supra.* The court also found that the contract with respondent's owners, approved by the I.C.C. in 1942, provided for indemnification by P.F.E. of its owners against liability for injury or damage to personnel or property of the owners while acting on behalf of P.F.E. and fixed responsibility of P.F.E. for damage to any freight as a result of any improper service on its part.

[32] Although direct Interstate Commerce Commission control over respondent's operations stems from the grant of authority in the Transportation Act of 1940, 54 Stat. 917, 49 U.S.C. § 20(6), the Commission was previously aware of the problems of refrigerator car rates and of its ability to regulate indirectly by directives to operating railroads. See Report of the Commission, 50 I.C.C. 652, 677 (1918), *In the Matter of Private Cars.*

> ing by rail. *P.F.E. deals directly with the shipper* and, among other activities, maintains a service by which it keeps the shipper posted as to the whereabouts of its goods in transit, thus allowing the shipper to order goods diverted from one destination to another. (A. 53-54, italics added.)

The court below, believing that "[w]ere the slate clean, we might well be convinced by [petitioner's] argument for a broader definition," elected nonetheless to revivify the strict construction applied originally by the district court in 1948 in *Gaulden v. Southern Pacific Company,* 78 F. Supp. 651 (N.D. Calif. 1948), aff'd without further opinion 174 F. 2d 1022 (9th Cir. 1949), the earliest decision to approach the question of Employers' Liability Act application to a railroad freight refrigeration company.

SUMMARY OF ARGUMENT

The Federal Employers' Liability Act must be construed liberally, especially when viewed in terms of modern pronouncements of this Court on the subject of common carriers by railroad. Moreover, liberal construction of the Act requires that Pacific Fruit Express factually be seen as a common carrier by railroad in view of the nature of the operations transpiring at its yards—the building, maintenance and repair of railroad freight cars, servicing rolling stock for the transportation of perishable commodities in interstate commerce, constant supervision of the nationwide movement of goods, and especially the

constant control over the movement and eventual destination of the goods in transit. Additionally, petitioner's position is supported by the long line of terminal company cases.

The only way to effectuate the broad regulatory program which Congress has established for the railroad industry is to bring all operations wholly within that industry under the Employers' Liability Act. Negligence on the part of Pacific Fruit Express impairs the safety of its railway employees, the public and the even flow of interstate commerce fully as much as misconduct by any railroad terminal operation or full service railroad carrier.

ARGUMENT

"Whether a transportation agency is a common carrier depends not upon its corporate character or declared purposes, but upon what it does." *United States v. California*, 297 U.S. 175, 181 (1936).

I. INTRODUCTION

The broad language and liberal history of the Federal Employers' Liability Act have been such that few modern cases before this Court have required a determination of whether or not the activities of a particular transportation company bring it

within the scope of the F.E.L.A.[33] This is such a case. The status of Pacific Fruit Express would seem to be determined by the broad prefatory language of *Parden v. Terminal R. of Alabama Docks Dept.*, 377 U.S. 184, 185 (1964),[34] since respondent herein possesses each of the general attributes making the Alabama terminal company "undisputedly a common carrier by railroad engaging in interstate commerce."[35] *Id.*

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[33]Although this Court has had occasion since World War II to examine particular activities of traditional operating railroads, *see, e.g., Southern Pacific Co. v. Gileo*, 351 U.S. 493 (1955), it appears that only in the area of terminal companies has this Court had to deal with inclusion of particular companies themselves within the F.E.L.A. *E.g., Parden v. Terminal R. of Alabama Docks Dept.*, 377 U.S. 184 (1964).

[34]"Consisting of about 50 miles of railroad tracks in the area adjacent to the State Docks at Mobile, it serves those docks and several industries situated in the vicinity, and also operates an interchange railroad with several privately owned railroad companies. It performs services for profit . . . . It conducts substantial operations in interstate commerce. It has contracts and working agreements with the various railroad brotherhoods . . . ; maintains its equipment in conformity with the Federal Safety Appliance Act . . . ; and complies with the reporting and bookkeeping requirements of the Interstate Commerce Commission."

[35]Owning and operating tracks, engines, terminals and the largest fleet of refrigerated freight cars in the United States (A. 21, 40), Pacific Fruit Express devotes its entire operation to the direct and indirect service of both shippers and carriers of perishable commodities. This includes movement of railroad cars for icing and repair operations (A. 22), construction and maintenance of refrigerator railroad cars (A. 47), directing the movement of its cars while carrying perishables in interstate commerce (A. 49), and providing all necessary service for the pick-up, movement and delivery of perishables. (A. 38-40.) P.F.E. has formal written contracts to render protective services to a number of railroads (A. 18), and deals with shippers and railroads on a nation-wide basis. (A. 40.) It performs services for profit (A. 21) and does not deny its involvement in interstate commerce. P.F.E. has contracts and working agreements with various railroad brotherhoods (n. 4, *supra*), maintains its equipment in conformity with the Federal Safety Appliance Act, 27 Stat. 531, 45 U.S.C. §1 et seq. (n. 27, *supra*), and complies with the reporting and bookkeeping requirements of the Interstate Commerce Commission. (A. 20.)

Nonetheless, the Court of Appeals elected to construe the central language of the F.E.L.A. "narrowly" while rejecting the "broader definition" urged by petitioner. (A. 54.) The Court of Appeals candidly admitted its belief that the more remedial solution would be appropriate "were the slate clean," but chose to adhere to a restrictive line of reasoning inappropriate to Employers' Liability Act cases. It is the position of petitioner that there can exist no justification for an exception to the broad construction traditionally applied to federal statutes in the protection of railroad workingmen.

The inference is inescapable from its brief opinion that the court below recognized the common carrier and railroad attributes of respondent and also observed the identity of railroad perils facing P.F.E.'s employees. Nevertheless, the Court of Appeals opted in favor of a judicial philosophy inimical to modern F.E.L.A. thinking.

II. PACIFIC FRUIT EXPRESS IS A COMMON CARRIER BY RAILROAD UNDER APPLICABLE MODERN GUIDELINES

In reaching its conclusion, the Court of Appeals rejected a distinguished line of cases both cogent and relevant in this discussion—the terminal company cases. A terminal company ordinarily prepares, services, supervises and occasionally operates railroad equipment between journeys and rarely acts upon the equipment while it is actually in use crossing state

lines.[36] As such these businesses provide a service to general service rail carriers, own little and sometimes no railroad track or equipment, and—most significantly—differ from respondent in that they exercise *no control* over the actual interstate management or carriage of goods. There does not seem to be any instance of a terminal company holding itself out to the general public by advertising or directory listing as a common carrier by railroad. Nevertheless, because of the intimate involvement of terminal companies in the fabric of interstate railroad commerce, they are included within the operation of the Interstate Commerce Act,[37] the Railway Labor Act,[38] the Hours of Service Act,[39] the Federal Safety Appliance Act,[40] and—most notably—the Federal Employers' Liability Act.[41] There is no modern authority excluding the terminal companies from the scope of any applicable federal railroad legislation.

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[36]See *Fort Street Union Depot Company v. Hillen*, 119 F.2d 307 (6th Cir. 1941); *McCullough v. Jacksonville Terminal Co.*, Fla.App., 176 So.2d 345 ((1965).

[37]34 Stat. 584, 49 U.S.C. §1; *Union Stockyards v. United States*, 308 U.S. 213 (1939).

[38]48 Stat. 1185, 45 U.S.C. §151; *California v. Taylor*, 353 U.S. 553 (1957).

[39]34 Stat. 1415, 49 U.S.C. §61; *United States v. Brooklyn Eastern District Terminal Co.*, 249 U.S. 296 (1919); *Bush v. Brooklyn Eastern District Terminal Co.*, 218 N.Y.S. 516, 218 App.Div. 782 (1926).

[40]27 Stat. 531, 45 U.S.C. §1; *United States v. California*, 297 U.S. 175 (1936).

[41]*Parden v. Terminal R. of Alabama Docks Dept.*, 377 U.S. 184 (1965); *Fort Street Union Depot Company v. Hillen*, 119 F.2d 307 (6th Cir. 1941); *Maurice v. California*, 43 Cal.App.2d 270, 110 P.2d 796 (1941); *McCabe v. Boston Terminal Co.*, 303 Mass. 450, 22 N.E.2d 33 (1939), reversed on other grounds, 309 U.S. 624 (1940).

It therefore becomes of great significance that Pacific Fruit Express is required to comply with the Safety Appliance Act,[42] and is also included in the Railway Labor Act,[43] the Railroad Retirement Act,[44] and the Railroad Unemployment Insurance Act.[45] Consistency in the application of the broad regulatory policy of Congress requires that Pacific Fruit Express be included within the F.E.L.A.

> The language of the FELA is at least as broad and all-embracing as that of the Safety Appliance Act or the Railroad Labor Act, . . . If Congress made the judgment that, in view of the dangers of railroad work and the difficulty of recovering for personal injuries under existing rules, railroad workers in interstate commerce should be provided with the right of action cre-

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[42] n. 27, *supra*.

[43] 45 U.S.C. §151: "First. The term 'carrier' includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control by any carrier by railroad and which . . . performs any service in connection with . . . refrigeration or icing. . . ."

[44] 45 U.S.C. §228: "(a) The term 'employer' means any carrier (as defined in subsection (m) of this section), and any company which is directly or indirectly owned or controlled by one or more such carriers or under common control therewith, and which operates any equipment or facilities or performs any service . . . in connection with . . . refrigeration or icing.

"(m) The term 'carrier' means an express company, sleeping-car company, or carrier by railroad, subject to Part I of the Interstate Commerce Act."

[45] 45 U.S.C. §351: "(a) The term 'employer' means any carrier (as defined in subsection (b) of this section), and any company which is directly or indirectly owned or controlled by one or more such carriers or under common control therewith, and which operates any equipment or facility or performs any service . . . in connection with . . . refrigeration or icing. . . .

"(b) The term 'carrier' means an express company, sleeping car company, or carrier by railroad, subject to Part I of the Interstate Commerce Act."

> ated by the FELA, we should not presume to say, in the absence of express provisions to the contrary, that it intended to exclude a particular group of such workers from the benefits conferred by the Act. *Parden v. Terminal R. of Alabama Docks Dept.*, 377 U.S. at 189-190 (1964).

Congress enacted broad protection for the workingman against the perils of interstate rail commerce. It is the "danger to be apprehended" that invokes the shield of federal legislation, and it is immaterial from what segment of the railroad industry the peril may emanate. *United States v. California,* 297 U.S. 175, 185 (1936). This Court long ago determined that Congress intended to utilize the maximum reach of its authority to protect the railroad working force in interstate commerce "no matter what the source of the dangers which threaten it." *Mondou v. New York, N. H. & H. R. Co.,* 223 U.S. 1, 51 (1912) (the Second F.E.L.A. Cases).

Even a cursory review of the record in this case establishes that the dangers of railroad work, the difficulties of recovering adequate compensation for railroad-associated injuries, the threat of injury to interstate commerce and persons engaged in furthering commerce are all present in respondent's operations.

III. THE COURT OF APPEALS ERRED IN ITS RELIANCE UPON GAULDEN v. SOUTHERN PACIFIC CO.

Petitioner is mindful of the fact that Pacific Fruit Express has been involved in earlier F.E.L.A. litigation on three previous occasions, in each instance as a co-defendant with one of its owners.[46] In contrast to other litigation involving respondent, however, petitioner herein has not joined either of respondent's owners in this action. Nor has petitioner attempted to impute the operations of respondent's owners to respondent itself. Because there has not been a single reported case involving a personal injury action against P.F.E. which did not also include one or both of its owners as parties defendant, every such prior F.E.L.A. action has suffered from the infusion of questions of agency, contract, employment or joint enterprise. These analyses shared a common weakness: they engaged in a search for *the* railroad—as between respondent or its owners—as if there were some convincing force in the bare fact that respondent commonly works *with* railroad companies.[47] The

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[46] *Gaulden v. Southern Pacific Co.*, 78 F.Supp. 651 (N.D. Calif. 1948), aff'd without opinion 174 F.2d 1022 (9th Cir. 1949); *Moleton v. Union Pacific Railroad*, 118 Ut. 107, 219 P.2d 1080 (1950), cert. den. 340 U.S. 932 (1951); *Aguirre v. Southern Pacific Co.*, 232 Cal.App.2d 636, 43 Cal.Rptr. 73 (1964). *Moleton* and *Aguirre* both rest upon *Gaulden* and the cases cited therein. The court in *Aguirre* noted that the facts in all three cases were substantially the same. 232 Cal.App.2d at 645, 649. Accordingly the following discussion deals with *Gaulden* as the seminal decision but should be read as applicable equally to the other cases.

[47] "True, the service is performed by the Terminal under contracts with the railroad companies as agent for them, and not on its own account. But a common carrier does not cease to be such merely because the services which it renders to the public

plaintiff in *Gaulden v. Southern Pacific Co.*, 78 F. Supp. 651 (N.D. Calif. 1948), made no real effort to show that P.F.E. in its own right is a common carrier by railroad.[48] It is plain that the questions presented for decision in *Gaulden* were removed from any valid interpretation of the F.E.L.A. by the intervention of contract and agency issues. *Gaulden* in reality can stand only for the limited proposition that the *contract* between Southern Pacific and Pacific Fruit Express did not expose respondent's owners to F.E.L.A. liability for injuries to respondent's employees on the basis of agency, joint enterprise or fraud theories. Insofar as that decision might purport to go farther,

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are performed as agent for another. The relation of connecting carriers with the initial carrier is frequently that of agent. [Citation omitted.] The relation of agency may preclude contractual obligations to the shippers, but it cannot change the obligations of the carrier concerning the physical operation of the railroad under the Hours of Service Act, which, as this court has said, must be liberally construed to secure the safety of employees and the public." *United States v. Brooklyn Eastern District Terminal*, 249 U.S. 296, 306-307 (1919).

[48] *Gaulden* was based essentially on the argument that P.F.E. was an agent of Southern Pacific, that Southern Pacific and P.F.E. were a joint enterprise—making the plaintiff an employee of S.P., that the contract between S.P. and P.F.E. violated Section 5 of the F.E.L.A. as an attempt to evade liability by device, and that the 1939 amendment to the F.E.L.A. "being remedial and humanitarian in purpose, the courts should construe the intent of Congress to include the appellee . . . as a 'Common Carrier by Railroad. . . .'" Brief for Appellant [Gaulden], 7-8, 2555 Records of the U.S. Circuit Court of Appeals, Number 12062. The entirety of the appellant's argument on the last point consisted of one paragraph, without any supporting authority, to the effect that the amendments in question should cause the courts to "construe liberally the phrase 'common carrier by railroad' so as to include refrigeration car service." *Id.* at 18.

The District Court's treatment of this last argument was confined to a comment that these "remedial and humanitarian purposes . . . in no way compel an interpretation of the *contract* in favor of an *employment or agency relationship*" between S.P. and P.F.E. 78 F.Supp. at 654, 656-657 (italics added).

it cannot be viewed as reliable authority since neither sufficient facts nor proper legal authorities were before the courts at that time. Yet the Court of Appeals in the instant matter, fully apprised of the defects in *Gaulden* and the succeeding decisions based thereon, elected to resurrect the earlier decision.

In addition to this fundamental postural distinction between *Gaulden* and the instant case, significant factual differences now appear in the very operations of P.F.E., further demonstrating the common carrier nature of respondent's business. The *Gaulden* opinion described respondent in the following terms:

> The shippers specify to the carrier, in writing, the type of service desired; they may, by written order, change the type of service originally requested. . . . The shipper's orders are transmitted by the carrier to the Pacific Fruit Express Company . . . [which] transacts none of its protective service business directly with the shippers. 78 F. Supp. at 654.

The brochure "NOW—PFE Goes Piggyback!" (A. 37-40) makes it amply apparent that respondent in fact deals directly with the shipping public. Moreover, the fact that respondent holds itself out in telephone directories throughout the nation as a common carrier by railroad negates this early finding by the *Gaulden* court. The Court of Appeals specifically recognized this major change in the available facts regarding respondent's operations when it noted that "P.F.E. deals directly with the shipper". (A. 54.)

Essentially the *Gaulden* case—and therefore the decision of the court below—rests upon the early

obiter dictum of *Wells Fargo v. Taylor,* 254 U.S. 175, 187 (1920), defining a common carrier by railroad as "one who operates a railroad as a means of carrying for the public,—that is to say, a railroad company acting as a common carrier." Such a narrow definition is no longer appropriate to F.E.L.A. litigation—if ever it was. The early tendency to narrow and dilute the F.E.L.A. which occupied much of the judicial literature during the first two decades following its enactment has been abandoned. The clear and explicit Congressional mandate for broad application has been recognized in almost every area of the railroad industry save the one presently before this Court. The *Wells Fargo* decision can no longer be credited with any vitality in measuring the coverage of the F.E.L.A. It represents only a gratuitous finding that the express company was not *the* common carrier by railroad involved in that case. It is noteworthy that express companies have subsequently been recognized and classified as common carriers, and any exclusion of the application of the Employers' Liability Act arises from their lack of railroad appliances and facilities rather than from any shortage of transportation activities in interstate commerce; they are common carriers by means other than railroad.[49]

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[49] "The expression 'by railroad' in the federal statute is but descriptive of the kind of common carrier to which the statute relates, distinguishing railroads from common carriers of other kinds to which the act does not extend, and . . . , by the statute, it was not attempted or intended to define the kind of instrumentalities used on which their liability for negligence should exist or by which it should be limited. . . . [Citing Second Employers' Liability Cases, 223 U.S. 1.]" *Hamarstrom v. Missouri-Kansas-Texas R. Co.,* 233 Mo.App. 1103, 116 S.W.2d 280, 286 (1938).

Fleming v. Railway Express Agency, 161 F. 2d 659 (7th Cir. 1947); *Jones v. New York Central,* 182 F. 2d 326 (6th Cir. 1950); *Railway Express Agency v. Esformes,* 174 N.Y.S. 2d 878, 12 Misc. 2d 1038 (1958).

In *Fleming v. Railway Express Agency, supra,* 161 F. 2d at 661, the court had no hesitation in holding that

> a common carrier is one who, for hire, engages in transporting commodities from one place to another, or in connection with another carrier, such as a railroad. It does not step outside its common carrier status because it only renders part, though a necessary part, of a transportation service, or because it renders its service as an agent of a common carrier.

Even if respondent acts in part through other companies, that does not alter the fact that P.F.E. is a common carrier by railroad.[50]

IV. THE COURT OF APPEALS IGNORED THE REMEDIAL INTENT OF THE F.E.L.A.

The court below has resurrected a barrier to the broad uniform application of the remedial legislative system governing the interstate transportation of commodities by rail. This totally ignored the expansion of the F.E.L.A. which has kept pace with the

[50]See, for example, *Eddings v. Collins Pine Company,* 140 F. Supp. 622 (N.D. Calif. 1956). This well-reasoned opinion found a lumber company which wholly owned and controlled a small railroad corporation to be a common carrier by railroad even though the lumber company was not organized as a railroad carrier under traditional lines.

growth of remedial federal legislation generally, and in particular with the maritime sector. The courts have methodically avoided highly technical or artificial distinctions and have sought basic practical answers to the problems in defining the borders of these industries.[51] For example, in distinguishing between the application of the F.E.L.A. and the Longshoremen & Harbor Workers' Compensation Act, 44 Stat. 1424, 33 U.S.C.A. §901 et seq., the courts simply look to determine what the primary duties of the employee are; if the primary duty is railroading, then the F.E.L.A. applies, while if more maritime or longshoreman in nature the other statute controls.[52] Certainly the same type of test if applied to the instant matter brings petitioner within the F.E.L.A. rather than any state administrative remedy. Petitioner was employed in a railroad yard where movement of rail cars was ocurring, where car maintenance, loading and unloading were taking place, where the interstate transportation of perishable commodities by rail was being effectuated. This is railroading work. The decision of the court below cannot be explained in terms of any of the principles heretofore enunciated in the construction of the F.E.L.A. and should not be permitted to foreclose litigants such as petitioner from securing the federal remedy designed for the perils of the industry in which they work.

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[51]Compare, for example, *Southern Pacific v. Gileo*, 351 U.S. 493 (1955), and *Reed v. Pennsylvania R. Co.*, 351 U.S. 502 (1955), with *Guiterrez v. Waterman Steamship Corp.*, 373 U.S. 206 (1963).

[52]See discussion and cases cited in Richter and Forer, *Federal Employers' Liability Act*, 12 F.R.D. 13, 26-27.

CONCLUSION

Pacific Fruit Express Company has labored mightily to create for itself a treasured immunity from liability under the F.E.L.A. Nor on the other hand is it presently subject to uniform state regulation, for it does not report to the California Public Utilities Commission or to any other state utilities commission.[53] (A. 20.) It now enjoys the incredible luxury of escaping responsibility under any comprehensive regulation or uniform liability system.[54] The time has come for a realistic appraisal of respondent's operations. If the Employers' Liability Act is still to be construed liberally to effectuate its beneficial purposes,[55] respondent's employees must be given the protection of that Act. Moreover, if the remedial and protective aspects of the

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[53]California Public Utilities Code § 202 excuses from the operation of that Code enterprises in interstate commerce. Were it not for this exemption, it appears that P.F.E. would be a common carrier by rail under applicable California statutes. Pub. Util. Code § 229 includes all tracks, depots, yards, grounds, terminals and terminal facilities, and all other equipment used in rail transportation within the term "railroad"; § 230 defines a "railroad corporation" as every corporation which owns, controls, operates or manages any railroad in the state; § 211 declares every such railroad corporation to be a common carrier. Compare Arizona Constitution, Art. 15, § 10; Idaho Code Annotated §§ 61-113, 61-107; Montana Revised Code Anno. §§ 72:114, 72:115; Nevada Revised Statutes § 704.020; Oregon Revised Statutes § 760:010, all to the same general effect as the parallel California law.

[54]Notwithstanding respondent's protestations to the contrary, it appears that the Interstate Commerce Commission can, if it desires, exercise effective control over respondent's rates and general services. See 50 I.C.C. 652, 677 (1918); 253 I.C.C. 21 (1942); 318 I.C.C. 111 (1962). There is absolutely no corollary control over its safety practices or liability for damages, however.

[55]*Lilly v. Grand Trunk Western Railroad*, 317 U.S. 481 (1943); *Jamison v. Encarnacion*, 281 U.S. 635 (1930).

Federal Safety Appliance Act and similar remedial railroad legislation are to be effectuated through the F.E.L.A.,[56] how is P.F.E. to be required to bear its responsibilities as "the nation's largest operator of refrigerated rail cars" if its employees receive no assistance under the F.E.L.A.? To exempt respondent is to remove the only effective means of enforcing such statutes against Pacific Fruit Express and similar operations included within the other regulatory federal railroad statutes.

Before the courts, Pacific Fruit Express Company carefully seeks to create an image divorced as far as imaginable from the carriage of goods by rail. But when viewed practically, P.F.E. cannot escape the fact that its every action represents a direct venture in that industry alone. Perhaps the most eloquent argument to this effect was made almost thirty years ago, not in the published records of any court proceeding, but in the pages of one of the nation's most widely read periodicals, Business Week Magazine. In its December 9, 1939, issue, Pacific Fruit Express was quite simply and directly described in terms suitable only to an enterprise solely and entirely involved in transporting America's perishable commodities from grower to market by railroad. This article is reprinted herein as Appendix A to illustrate most vividly the fact that a company which acts and appears so like a rail carrier must be in fact and in law a common

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[56] *Urie v. Thompson*, 337 U.S. 163 (1949).

carrier by railroad under the Federal Employers' Liability Act.

Because the decision of the court below departs so radically from the established interpretation of the F.E.L.A. and the uniform application of this Act, it is respectfully submitted that the decision of the Court of Appeals should be reversed.

Dated, San Francisco, California,
November 27, 1967.

Respectfully submitted,
DAVID S. LEVINSON,
ARNE WERCHICK,
WERCHICK & WERCHICK,
Attorneys for Petitioner.

(Appendix A Follows)

Snaking their way across the country to an undesignated destination, approximately 67 of the 99 cars on this Pacific Fruit Express—according to past performances—will be diverted en route. The P. F. E. handles many perishables without any definite delivery point, informs shippers by telegraph of the location of their cars. Shippers study the markets, decide where to deliver produce while the train is en route. Of the 38,000 cars handled annually by P. F. E., about 23,000 are thus diverted.

under the Interstate Commerce Act. In other words, should these overriding or indirect carriers be entitled to the same regulation as a direct carrier? (The ICC has repeatedly urged regulation of freight forwarders; under the present act it administers, however, it feels that there is no provision for them). And pending the court's decision in the case, the ICC is holding its Acme order in abeyance until Jan. 10.

If the ICC can make its order stick, forbidding the filing of tariffs, the ruling will mean that forwarders may lose much of their present competitive advantage. No longer will truck common carriers be permitted to make concurrences (agreements) with them concerning rates.

ICC Fights Chicago Decision

But the forwarders have an ace up their sleeves, in the form of a Chicago federal court decision. This decision outlawed an ICC ruling which forbade truck common carriers from granting forwarders proportional rates. Some forwarders feel that if this decision holds water, substitution of proportional rate arrangements will in time counteract the loss of concurrences—if the latter are eventually outlawed. Meanwhile, however, the ICC intends to battle the Chicago court's decision right up to the Supreme Court.

The fuss over forwarders will be further accentuated next month when a Senate interstate commerce committee investigation is expected to come up. At that time, too, the joint report on the transportation bill held over from the last session of Congress (*BW—Aug5'39, p16*) will be reported out of committee. Forwarders hope that in the bill that finally emerges a provision will appear placing them under ICC supervision. At present, only the House version of the bill does this. That would solve most of the forwarder problem. Until then, however, a very good fight is in view.

Growers' Life Line

Pacific Fruit Express Co. in spotlight with $10,000,000 program of refrigerator car repair.

TRANSPORTATION to eastern markets is the life line of the large-scale fruit and vegetable industry of the west. Because of this, announcement by Pacific Fruit Express Co. last week that $10,000,000 would be spent for rebuilding and repairing refrigerator cars during the first six months of 1940 was big news to interests allied with production and distribution of perishables.

Some 2,300 cars have been rebuilt so far this year by P.F.E. By July, 1940, another 2,500 will be readied for the seasonal rush peak. The company has spent something like $21,000,000 for 5,700 new refrigerator cars in the last 10 years and is now building 25 socalled super-giant cars (nothing new, but just jumbo-size cars) at a cost of $150,000.

Rebuilding a refrigerator car means replacement of the box part with an entirely new superstructure. The only parts of the original car that go into the rebuilt unit are the underframes and trucks.

Last week the P.F.E., usually very reticent about its operations, revealed a few colorful items of information. It now claims to be the world's largest operator of refrigerator cars, with 33 years of experience in hauling the west's perishables to market. It was organized jointly by the Southern Pacific and Union Pacific in 1906 with 6,600 cars and an office force of three persons. It now has more than 3,000 employees in peak seasons; owns 17 manufacturing and two natural ice plants, and has icing platforms to handle 3,738 cars simultaneously.

Under P.F.E. schedules, refrigerator cars loaded with perishables during the day are moved to established concentration points. From these, trains begin to move eastward every morning at 3 A.M. for guaranteed arrival in Chicago on the morning of the seventh day. The schedule allows a leeway of 16 hours so that cars delayed in reaching concentration yards will be hauled into Chicago early on the seventh morning.

Maneuvering for Markets

Model railroad fans who like to shunt freight cars around a complicated system of miniature tracks might ponder this:

The P.F.E. schedule permits shippers to change their minds about destination while the train is en route and to divert their produce to the most favorable market. Many perishables are handled by P.F.E. without a definite delivery point.

Shipper and consignee are kept informed by telegraph of the location of their particular cars and while the train rolls eastward, the shipper studies markets and makes up his mind where his produce is to be delivered. Of the 38,000 cars handled annually by P.F.E., about 23,000 are diverted en route—6,000 of them twice, 3,000 three times.

SUMMARY OF ARGUMENT

The established and unquestionable modern policy of giving the Federal Employers' Liability Act the broadest and most liberal application is directed to the entire railroad industry engaged in interstate commerce. The members of the railroad Brotherhoods employed by P.F.E., enabling respondent to effectuate the transportation of perishable commodities in interstate commerce, do the same basic jobs as their fellows employed by Southern Pacific or Union Pacific, or any other operating railroad.

The F.E.L.A. is more efficient than any presently existing alternative. Congress has provided for jury trials for railroad workmen and has created the maximum protection which legislative refinement of common law remedies can provide. The applicable modern authority, the efficacy of the F.E.L.A., the need for a consistent and uniform system of Federal railroad legislation—all support the conclusion that respondent Pacific Fruit Express is a "common carrier by railroad" under the F.E.L.A. The decision of the Court of Appeals disrupts the even application of the Congressional scheme for regulating the railroad industry for no valid reason.

ARGUMENT

Of overriding importance is the fact that the employees of Pacific Fruit Express are engaged in the same work and exposed to the same risks of railroad-

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MOTION FOR LEAVE TO FILE BRIEF, AMICI CURIAE and BRIEF OF THE BROTHERHOOD OF RAILWAY CARMEN OF AMERICA, THE BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, and THE SWITCHMEN'S UNION OF NORTH AMERICA, AMICI CURIAE

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ing as are the employees of all operating railroads in the United States. To reach the conclusion of the Court of Appeals in *Edwards v. Pacific Fruit Express,* it is necessary to hypothesize on the part of Congress an intention to limit the coverage of the F.E.L.A. only to certain classes of railroad workers. Yet this inference is unjustified and when resorted to by lower courts in the past has been explicitly criticized by this Court.

> To read into this all-inclusive wording a restriction as to the kinds of employees covered . . . would be contradictory to the wording, the remedial and humanitarian purpose and the constant and established course of liberal construction of the Act followed by this Court.[2]

This Court long ago determined that the Act was not to be narrowed by a "refined reasoning" but was most definitely to "be construed liberally to fulfill the purposes for which it was enacted . . ."[3] Congress re-enacted the F.E.L.A. in 1908 in the belief that a national law operating uniformly would better serve the needs of railroad employees than sporadic state action and thereby exercised its broad power "to secure the safety of interstate transportation and of those who are employed therein, no matter what the source of the dangers which threaten it."[4]

The broad policy of protecting employees in the railroad industry should specifically be applied to the

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[2] *Urie v. Thompson,* 337 U.S. 163, 181-182 (1949).
[3] *Jamison v. Encarnacion,* 281 U.S. 635, 640 (1930).
[4] The Second Employers' Liability Cases, 223 U.S. 1, 51 (1912).

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MOTION FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE

The Brotherhood of Railway Carmen of America, the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes, and the Switchmen's Union of North America respectfully move for leave to file a joint brief as *amici curiae* in this case. The consent of the attorneys for the petitioner has been obtained. The consent of the attorneys for the respondent was requested but refused.

The Brotherhood of Railway Carmen of America (hereinafter "the Carmen") consists of approximately 160,000 railroad industry employees. Collective bargaining agreements are presently in operation

between the Carmen and operating railroads throughout the nation. Members of this Brotherhood are engaged generally in the work of constructing, rebuilding, repairing and maintaining railroad equipment, including freight cars. The employees of Pacific Fruit Express engaged in this work—representing a substantial portion of respondent's work force—are members of this Brotherhood, and the Carmen have a collective bargaining agreement with P.F.E. properly filed with the National Mediation Board.

The Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes (hereinafter "the Clerks") has approximately 270,000 members nationally. This Brotherhood has collective bargaining agreements with operating railroads including Southern Pacific and Union Pacific Companies, as well as with Pacific Fruit Express. In the railroad industry, this union represents both clerical and yard working men; members of the Clerks include those employees who load ice on P.F.E. cars as well as those who load goods on box cars of other railroads and ice on passenger trains (commissary workers and caboose supply men). At Roseville, California, for example, where members of this Brotherhood are employed by Southern Pacific Company and by respondent, Clerks are engaged in the same jobs at Southern Pacific as at the adjacent P.F.E. yard.

The Switchmen's Union of North America represents approximately 4,000 yard workers who engage

in railroad switching operations, train make-up, and other train movements within yard limits. Although we do not represent any Pacific Fruit Express employees, Switchmen are employed to effect the yard movement of cars and trains at Southern Pacific, including those cars moved to and from the P.F.E. yard which abuts the Southern Pacific yard at Roseville, California. Switching operations on the P.F.E. yard are handled by its own employees who in that respect do exactly the same work as our men do for Southern Pacific.

Amici are seriously concerned about the outcome of this case. Traditionally the railroad Brotherhoods and unions have participated actively in the campaign for legal protection of the railroad workman from the hazards of his occupation.[1] Our interest in this case stems from the fact that our respective members are doing the same work, incurring the same risks and frequently suffering the same injuries and disabilities to the same extent—regardless of the corporate name of their employers. Yet if the rule of *Edwards v. Pacific Fruit Express* as announced by the Court of

[1]Recognition of the active role of railroad unions in the enactment of the Federal Employers' Liability Act, 45 U.S.C. §51, and the Federal Safety Appliance Act, 45 U.S.C. §1, was given by this Court in *Brotherhood of Railroad Trainmen v. Virginia*, 377 U.S. 1, 3 (1964). Counsel for the Brotherhoods have consistently involved themselves in litigation expanding the breadth of the federal remedies available to our members. See, *e.g.*, *Maurice v. California*, 43 Cal.App.2d 270, 110 P.2d 796 (1941), extending the F.E.L.A. to include the California belt line [terminal] railroad; *Ericksen v. Southern Pacific Co.*, 39 Cal.2d 374, 246 P.2d 642 (1952), cert. den. 344 U.S. 897, 73 S.Ct. 277, 97 L.Ed. 693, holding that a railroad lumber inspector injured while examining new ties on the loading dock of a lumber company came within the protection of the F.E.L.A.

Appeals be perpetuated, one segment of our Brotherhood memberships will continue to be denied the remedies established by Congress for the protection of railroad working men while the balance of our men in the railroad industry are adequately protected by the uniform application of the F.E.L.A.

Amici believe it appropriate that arguments be presented demonstrating the desirability of uniformity in the application of the F.E.L.A., the superiority of this protection as an industrial injury remedy, and the necessity for broad interpretation of the F.E.L.A. to effectuate its remedial and humanitarian purposes for all exposed equally to the same industrial hazards. An examination of the briefs filed in the Court of Appeals suggests that the arguments which *Amici* will offer will not be presented by the petitioner in this case.

Dated, San Francisco, California,
November 22, 1967.

Respectfully submitted,

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BRIEF OF THE BROTHERHOOD OF RAILWAY CARMEN OF AMERICA, THE BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, and THE SWITCHMEN'S UNION OF NORTH AMERICA, AMICI CURIAE

OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 378 F.2d 54.

workmen of Pacific Fruit Express who face the same hazards and provide the same services as their co-workers building and maintaining, moving, switching, loading[5] and cleaning railroad rolling stock for other employers. This Court determined over ten years ago that an employee of Southern Pacific Company engaged purely in new car construction was definitely within the purview of the F.E.L.A.[6] Yet those members of *Amici* employed by P.F.E. in the same work are denied the protection afforded by the Act. Such an arbitrary and narrow application of the F.E.L.A. is quite incompatible with what may be termed the *modern axiom* that the language of the Act be deemed all-inclusive unless a particular application has been specifically excluded.[7]

The effect of excluding the employees of P.F.E., engaged as they are in operations involved solely with the interstate transportation of goods by rail, is to deprive them of the remedy suited to this industry. This Court has previously taken note of the fact that Congress chose not to impose a workmen's compensation system for injured railroad workers.[8] The valid-

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[5]Loading and unloading accidents are included under traditional construction of the F.E.L.A. See Anno: Liability of railroad company under Federal Employers' Liability Act, for injury or death of employee resulting from its own activities in loading or unloading cars, 61 A.L.R.2d 811, 814; *cf. Atchison, T. & S. F. R. Co. v. Studer,* 213 F.2d 250 (9th Cir. 1954), finding liability for improper use and loading of a refrigerator car.

[6]*Southern Pacific Co. v. Gileo,* 351 U.S. 493 (1956).

[7]*Parden v. Terminal R. of Alabama Docks Dept.,* 377 U.S. 184, 189-190 (1964).

[8]*Rogers v. Missouri Pacific Railroad,* 352 U.S. 500, 509 (1957).

ity of this choice of remedies has ample support.[9] Workmen's compensation programs have been subject to criticism not only because the awards provided are wholly inadequate in many respects[10] but also because they tend to become out-dated and less efficient with the passage of time.[11] *Amici* do not suggest that this Court is to interfere with the application of workmen's compensation remedies in industries where no alternative remedy has been designated; it is, however, an injustice to the employees of P.F.E., engaged as they are in railroad work alone, to deprive them of the superior protection of the F.E.L.A. and subject them to a compensation scheme—specifi-

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[9]See discussion of Illinois Work Injuries Study reported in Conrad, *Workmen's Compensation: Is It More Efficient than Employer's Liability?*, 38 A.B.A.J. 1011 (1952). The study was an attempt to measure the expenses of administering the Illinois workmen's compensation system as compared with F.E.L.A. The results revealed that claimants' expenses under F.E.L.A. are less than one-half of claimants' expenses under the Illinois workmen's compensation system. Moreover, employers' claims expenses are also less than one-half under F.E.L.A. as compared to workmen's compensation, and the cost of F.E.L.A. to the taxpayers is stated to be less than one-eighth the cost of administering the state compensation system. Two of the most significant factors making F.E.L.A. a superior remedy are the economy of proceedings—a typical Illinois workmen's compensation claim going through three hearings before final decision, including those routinely settled—and the large number of F.E.L.A. cases that are adjusted without court proceedings.

[10]Griffith, *The Vindication of a National Public Policy Under the Federal Employers' Liability Act*, 18 LAW & CONTEMP. PROB. 160, 186 (1953); Richter, *Federal Employers' Liability Act*, 12 F.R.D. 13, 18 n. 26 (1951).

[11]Bancroft, *Workmen's Compensation Coverage and Other Remedies*, in CALIFORNIA WORKMEN'S COMPENSATION PRACTICE, California Continuing Education of the Bar, 28 (1963); Symposium on the Federal Employers' Liability Act, Foreword by Kramer, 18 LAW & CONTEMP. PROB. 100 (1953).

cally disapproved in the railroad industry—inappropriate to that industry.

The employees of respondent P.F.E. are presently within the protection of the Railway Labor Act,[12] the Railroad Retirement Act,[13] the Railroad Retirement Tax Act,[14] and the Railroad Unemployment Insurance Act.[15] P.F.E.'s rolling stock comes within the scope of the Federal Safety Appliance Act. It is incongruous to exclude from the F.E.L.A. employees receiving the protection of these other acts designed for the more complete protection of the railroad worker. This is especially the case since there is no logical reason to conclude that our members employed by P.F.E. are any less employed in the interstate common carriage of goods by railroad than our members employed by any railroad in the United States.

The decision in *Edwards v. Pacific Fruit Express* represents a step away from the broad remedial pattern of applying the F.E.L.A. This decision creates a vacuum in the Congressional regulation of the railroad industry and disrupts the even application of this humanitarian system for no valid reason. *Amici* believe that the question of whether employees of Pacific Fruit Express are included within the Employers' Liability Act is of great significance and is not limited in effect to the employees of P.F.E. We are keenly aware of the fact that the structure and

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[12] 45 U.S.C. §§151-188.
[13] 45 U.S.C. §228.
[14] Internal Revenue Code §3231.
[15] 45 U.S.C. §§351-367.

organization of the railroad industry can vary just as rapidly as the legal and commercial factors which bear upon that industry might change. Thus we are as vitally concerned with the direction taken in applying the F.E.L.A. as with its breadth. We most emphatically urge that the decision of the Court of Appeals be reversed.

Dated, San Francisco, California,
November 22, 1967.

Respectfully submitted,

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Brief for the Respondent

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Brief for the Respondent

QUESTION PRESENTED

Does the Federal Employers' Liability Act extend to refrigerator car companies?

STATEMENT OF THE CASE

This action originated by complaint in the United States District Court for the Northern District of California alleging personal injuries sustained by petitioner (hereinafter

called plaintiff) in November of 1963, in the course of his employment at Roseville, California. (A.2) The Complaint further alleges that respondent, Pacific Fruit Express Company (hereinafter called PFE) is a common carrier by railroad and subject to the Federal Employers' Liability Act (35 Stat. 65, 45 U.S.C. Section 51 et seq., hereafter sometimes referred to as FELA). (A.1) An answer was filed admitting employment and injury in the course of employment (A.5), and denying PFE's status as a common carrier by railroad. (A.5) The answer affirmatively shows PFE furnished Workmen's Compensation benefits to plaintiff pursuant to California law. (A.6, 7)

Shortly after filing its answer, PFE moved for summary judgment on the ground that it was not a common carrier by railroad and not subject to the Federal Employers' Liability Act. (A.8) The motion was supported by an affidavit of W. G. Cranmer, Assistant to the Vice-President and General Manager of PFE. (A.18) The affidavit states the PFE is a refrigerator car company. (A.18) The affidavit shows that PFE has two primary functions: (1) It owns and rents a large fleet of insulated railroad cars, known as refrigerator cars, suitable for the carriage of perishable commodities and (2) it furnishes icing and heating protective services to these cars. (A.18) The affidavit also shows that PFE has a main shop and ice plant at Roseville, California, where the plaintiff was injured, that it owns only shop tracks and loading tracks at various locations, and that it owns two shops switch engines, one located at Roseville the other at Tucson, Arizona. (A.21) The affidavit shows that plaintiff was an iceman whose primary duties have to do with moving ice from one location to another, operating conveyors, loading ice in the bodies of refrigerator cars, refueling mechanical cars and other miscellaneous protective service work. (A.22)

In opposition to the motion for summary judgment, plaintiff submitted a declaration[1] of an investigator for plaintiff's attorneys. The investigator states he called at the offices of PFE in San Francisco and obtained certain literature which he attached to his declaration. (A.36) The literature so obtained describes in more detail the types and construction of refrigerator cars, the nature of the refrigerator car industry and reiterates and amplifies the matters set forth in the affidavit of Cranmer. (A.41, 43) In the course of this general description the literature adds the following matters on which plaintiff seeks to rely: (1) That PFE owns a total of five shops (A.43); (2) That PFE operates 11 ice plants (A.43); (3) That PFE furnishes "diversion" and "passing" services and (4) PFE has offices and agencies in all principal Western produce areas and in principal cities. (A.40)

In addition to the foregoing, plaintiff seeks to rely on the extra record fact that in the classified telephone directories of various cities PFE is listed under the categories of "Railroads" and "Railroad Companies."

The honorable Albert Wollenberg, Judge of the District Court, granted PFE's motion for summary judgment on the ground that PFE was not a common carrier by railroad. (A.51). Plaintiff appealed to the Court of Appeals for the Ninth Circuit. That Court affirmed the summary judgment. (A.53)

SUMMARY OF ARGUMENT

A refrigerator car company such as the respondent is not a "common carrier by railroad" as defined in Federal

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1. California Law, California Code of Civil Procedure, Section 2015.5 permits a statement to be verified by stating that it is made "under penalty of perjury." Such statements are usually called declarations. The procedure appears not to be available in Federal Courts.

Employers' Liability Act. A "common carrier by railroad" for purposes of the Act is just what the term implies—a carrier for the public engaged in the business of physically operating and moving trains of cars over rails by means of locomotive power. No amount of sophistry can convert a company which supplies refrigerator cars into an operational railroad.

The decision of every court which has had to decide the status of a refrigerator car company in terms of the Federal Employers' Liability Act has been the same. On each and every occasion the decision has been that such companies are not railroads within the meaning of the Act.

The intent of Congress as to the meaning of "common carrier by railroad" is clear. The words were used to answer a criticism of this Court set forth in the *Employers Liability Cases* of 1907, (infra). Subsequent to the passage of the present Act in 1908, and before its 1939 amendment this Court made clear in its decisions that refrigerator car companies are something different than a "common carrier by railroad." With full knowledge of this Court's holdings that refrigerator car companies and railroads are different in nature and should be treated differently under law unless there is a specific statutory directive to the contrary, Congress chose not to include refrigerator car companies within the Act in its 1939 amendment. This choice of Congress came after it had, within the preceding five years, passed a series of laws involving railroads which specifically included refrigerator car companies. Thus, the words of the Act itself, the knowledge Congress had of this Court's actions and the acts of Congress all point to one conclusion and that is that a company engaged in supplying refrigerator cars is not subject to the Act.

There is no reason to try to extend the Act's coverage to areas not intended by Congress. The Act is hostile to

the interests of the employee, employer and their relationship to one another. It is out of step with the needs of a modern mechanized society. It is an anachronism which does not fulfill the social and economic needs of our time. The normal historical development of work injury remedies has moved from harsh common law concepts of negligence with all its many defenses such as contributory negligence, assumption of the risk and the fellow servant doctrine to a modified negligence statute or employer liability act such as the FELA and finally to the more modern and enlightened concept of workmen's compensation. The FELA is a bad law which has in large measure continued to exist because of the influence of vested interests which have made a profit from it at the unjustifiable expense of injured employees coming within its provisions.

A reversal by this Court of the judgments of the Court of Appeals and the District Court would deprive the thousands of employees of the respondent of substantial rights enjoyed under workmen's compensation statutes. The decisions below are correct. It would not be proper to make the status of "common carrier by railroad" under the FELA a question of fact. If that were the case, employees of the respondent as well as the respondent would be uncertain in each case as to the coverage for each accident and as a result almost every case would have to be litigated to allow a fact finder to determine which law should be applied.

The judgment below should be affirmed.

ARGUMENT

I. All Courts Which Have Considered the Precise Question Presented to This Court Have Held Refrigerator Car Companies Are Not Subject to the Federal Employers' Liability Act.

This is a suit against PFE alone and neither Southern Pacific Company, Union Pacific Railroad Company, (own-

ers of the PFE), nor any other railroad company is named as a defendant. It is conceded plaintiff was the employee of PFE at the time of his injury. No issues are tendered which are dependent on the nature of plaintiff's activity at the moment of his accident, nor on theories of alter ego or borrowed servant. (Brief for the Petitioner, page 21).

The only issue is as to the scope of the Act, that is, whether the FELA should be extended to refrigerator car companies. The resolution of the question will determine whether employees of that industry and other industries will in the future for their work connected injuries be covered by a system of workmen's compensation (in plaintiff's case, that of California) or a modified negligence statute (FELA). The mutual exclusiveness of the two systems is the result of the holding of this Court in *New York Central R. R. Co. v. Winfield,* 244 U.S. 147 (1916).

The question tendered has been considered by the Ninth and Third Circuits and by the state courts of California and Utah. Each decision has been against the position advanced by plaintiff in this case. In *Gaulden v. Southern Pacific Co.,* 174 F.2d 1022 (9th Cir. 1949) affirming judgment of District Court 78 F.Supp. 651 (N. D. Calif. 1948) plaintiff, an iceman sought to maintain an action under the Federal Employers' Liability Act against both his employer, PFE, and Southern Pacific Company. The accident happened at the icing yard and plant owned and operated by PFE at Bakersfield, California. The District Court gave substantial consideration to whether PFE was a common carrier by railroad within the meaning of the FELA. The Court concluded PFE was not such a carrier by railroad. Judgment was affirmed by the Court of Appeals on the grounds and for the reasons stated in the opinion of the District Court. The opinion of the District Court in this case is so well considered that it has been cited and quoted

extensively in every subsequent case dealing with the subject.

In *Hetman v. Fruit Growers Express Co.*, 346 F.2d 947 (3rd Cir. 1965) there was involved a decedent who was an employee of an independent contractor performing icing services for the defendant refrigerator car company. One of the questions raised was whether the defendant was "a common carrier by railroad." The Court answered, no, and affirmed the action of the trial court in granting summary judgment for the defendant.[2]

Aguirre v. Southern Pac. Co., 232 Cal.App.2d 636; 43 Cal. Rptr. 73 (1965) involved a summary judgment affirmed on appeal. The plaintiff was an employee of PFE at Roseville, California. The Court gave express consideration to whether PFE was a common carrier by railroad (p. 643) and on the basis of its own consideration of the authorities concluded it was not.

Moleton v. Union Pac. R.R. Co., 118 Ut. 107, 219 P.2d 1080, (1950) cert. den'd; 340 U.S. 932 was a case which was dismissed by the trial court on a non-suit and affirmed on appeal. Plaintiff was an employee of PFE at Laramie, Wyoming, but working in the yards of Union Pacific Railroad Company. The Court held PFE was not a common carrier by railroad within the meaning of the Federal Employers' Liability Act.

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2. In footnote 7, p. 8 of Petitioner's Brief, plaintiff seeks to factually distinguish the operations of Fruit Growers Express from those of PFE on the ground that "it simply leases cars while an independently contracted company ices and otherwise services the railroad cars." Interestingly enough, before the District Court, on the authority of *U.S. v. Fruit Growers Express*, 279 U.S. 363 (1929), plaintiff took the opposite position when he stated, "It is to be noted that the nature of Fruit Growers Express was considerably different than PFE. The so-called protective services is all that Fruit Growers provided . . . They did not own cars or tracks as does PFE." (A. 28, 29).

II. Both in the 1908 Enactment and the 1939 Amendment Congress Did Not Intend to Include Refrigerator Car Companies Within the Coverage of the Federal Employers' Liability Act.

At the time of the enactment of the Employers' Liability Act of 1906, and the enactment of the present Act in 1908, there existed a number of activities and facilities which, while used in conjunction with railroads and closely related to railroading, were yet not railroading itself. Sleeping car companies, private car lines of various sorts, express companies, various communication facilities, ferries and bridges were examples of these sorts of activities and facilities.

The first Employers' Liability Act, 34 Stat. 232 included within its coverage "every common carrier engaged in trade or commerce . . ." between the states. It was not on its face confined to common carriers by railroad. In construing the scope of the statute in the *Employers' Liability Cases,* 207 U.S. 463, (1908) the opinion of this Court noted:

> "From the first section it is certain that the act extends to every individual or corporation who may engage in interstate commerce as a common carrier. Its all-embracing words leave no room for any other conclusion. It may include, for example, steam railroads, telegraph lines, telephone lines, the express business, vessels of every kind, whether steam or sail, ferries, bridges, wagon lines, carriages, trolley lines, etc." (P. 497)

The Act was held unconstitutional.

The national discussion preceding enactment of the first Act, however, had been carried on in terms of accidents befalling the operating employees of railroad common carriers. See, for example, the Congressional debates: 40 pt. 5 Cong. Rec. 4601 (1906) Liability of Employers; 40 pt. 8 Cong. Rec. 7658 and 7916 (1906) Employers' Liability Bill.

Congress in passing the present Act in 1908, clarified the matter of scope of coverage. The Act as passed was

confined to common carriers by railroad, 35 Stat. 65; 45 U.S.C. Section 51, et seq. Congress, of course, was well aware of the objections found by this Court to the constitutionality of the first Act. The report on the 1908 bill in the House of Representatives prints in full the Opinion and Dissenting Opinions of this Court in the Employers' Liability Cases, H. R. Rep. No. 1386, 60th Cong. 1st Sess. Congress thus carefully confined the scope of the Act to common carriers by railroad. It did not extend it to other common carriers or other activities or facilities related to railroading. The purpose of the Act—the mischief to be checked—"relates to common carriers by railroad" and "is to change the common-law liability of employers . . . for personal injuries received by employees in the service." H. R. Rep. No. 1386, 60th Cong. 1st Sess. (1908) p. 1.

In the *Second Employers' Liability Cases,* 223 U.S. 1 (1912) this Court passed on the constitutionality of the present Act. At page 52 it was stated:

> "Coming to the question of classification, it is true that the liability which the act creates is imposed only on interstate carriers by railroad, although there are other interstate carriers, and is imposed for the benefit of all employes of such carriers by railroad who are employed in interstate commerce, although some are not subjected to the peculiar hazards incident to the operation of trains or to hazards that differ from those to which other employes in such commerce, not within the act, are exposed."

In 1915, in *Robinson v. Baltimore & Ohio R.R.,* 237 U.S. 84 this Court held that a Pullman car porter was not an employee of a railroad, hence, not within coverage of the Act. The Court stated at page 94, "It was well known that there were on interstate trains persons engaged in various services for other masters. Congress, familiar with

this situation, did not use any appropriate expression which could be taken to indicate a purpose to include such persons among those to whom the railroad company was to be liable under the Act."

In 1920, in *Wells Fargo & Co. v. Taylor,* 254 U.S. 175, this Court held that express companies were not within the coverage of the Act. At pages 186 and 187 the Court stated:

> "In our opinion the words 'common carrier by railroad,' as used in the act, mean one who operates a railroad as a means of carrying for the public,—that is to say, a railroad company acting as a common carrier. This view not only is in accord with the ordinary acceptance of the words, but is enforced by the mention of cars, engines, track, roadbed and other property pertaining to a going railroad (see *Southern Pacific Co. v. Jensen,* 244 U.S. 205, 212-213); by the obvious reference in the latter part of Sections 3 and 4 to statutes requiring engines and cars to be equipped with automatic couplers, standard drawbars and other appliances intended to promote the safety of railroad employees (see *San Antonio & Aransas Pass Ry. Co. v. Wagner,* 241 U.S. 476, 484); by the use of similar words in closely related acts which apply only to carriers operating railroads, c. 196, 27 Stat. 531; c. 225, 35 Stat. 476; c. 208, 36 Stat. 350, and by the fact that similar words in the original Interstate Commerce Act had been construed as including carriers operating railroads but not express companies doing business as here shown. 1 I.C.C. 349; *United States v. Morsman,* 42 Fed. Rep. 448; *Southern Indiana Express Co. v. United States Express Co.,* 88 Fed. Rep. 659, 662; s. c. 92 Fed. Rep. 1022. And see *American Express Co. v. United States,* 212 U.S. 522, 531, 534."

In 1939, Congress substantially amended the Act, 53 Stat. 1404. One of the proposed amendments was Senate Bill 1708 (76th Cong. 1st Sess., 1939). This bill would have

amended Section 1 of the Act to read, "Every common carrier by railroad, including every express company, freight-forwarding company, and sleeping-car company, engaged in commerce . . ." Such a proposal was, of course, in the face of the Court's construction of the Act to exclude employees of sleeping-car companies and express companies. It is noteworthy also that the proposed bill included another peripheral activity as to which the courts had not spoken—that of freight-forwarding.[3] Hearings were held before a sub-committee of the Committee on the Judiciary of the Senate commencing Tuesday, March 28, 1939. Representatives of Railway Express Agency and Pullman Co., spoke against the proposed extension of the scope of the Act, but no one could be found to speak in favor of it. The following colloquy ensued between Senator Neely, Mr. Wilson, representing Railway Express Agency, Mr. Williston representing the Pullman Company, and Mr. McGrath, general Counsel of the Brotherhood of Railway Trainmen:

> "SENATOR NEELY. Mr. Wilson, are you authorized to speak for the employees of the express company, or just the corporation?
>
> MR. WILSON. I am authorized to speak only for the company, but yesterday a representative of one of the unions told me I might speak for him. Over the telephone the other day I talked to Mr. Harrison, the head of the Brotherhood of Railway Clerks, perhaps the largest union in connection with our type of work. He

3. For a case holding freight forwarders not subject to FELA see *Latsko v. National Carloading Corp.*, 192 F.2d 905 (6th Cir. 1951). The court arrives at the result on the basis of the text of the act and various decisions cited in this brief. No mention is made in the opinion of the statutory history of exclusion of freight forwarders from the 1939 amendment.

Jones v. New York Cent. R. Co., 182 F.2d 326 (6th Cir. 1950) arrives at the same result for express companies, largely on the authority of *Well Fargo & Co. v. Taylor*, 254 U.S. 175. Again no mention is made of the statutory history of the 1939 amendment.

indicated to me over the telephone that I might say something for him.

SENATOR NEELY. Does Mr. Harrison join in your suggestion that the express companies be eliminated from the act?

MR. WILSON. Both Mr. Harrison and Mr. O'Brien, the latter representing the International Brotherhood of Teamsters, Chauffeurs and Helpers. Mr. O'Brien stated very definitely that he was very much opposed to the inclusion of express companies.

SENATOR NEELY. May I inquire of the attorney for the Pullman Co. whether the representatives of the employees of that company join the representative of the corporation in asking to be excluded from the operation of this bill?

MR. WILLISTON. No. We have not heard from them. They have never objected to the manner of our operation.

SENATOR NEELY. At whose request were the express companies and the Pullman Co. included in the proposed legislation?

MR. MCGRATH. Maybe I can throw a little light on that question. I think it was in 1932 that the Railway Labor Executives Association endorsed an amendment such as this. At that time the Harrison organization—I am not sure about Mr. O'Brien, because his organization is not affiliated with the Railway Labor Executives Association—was in favor of incorporating express-company employees. I presume the Pullman employees got in likewise. I am not sure, but apparently they have abandoned that position, perhaps on further information. The representative of the teamsters was here yesterday. He referred to his affiliation with the American Federation of Labor, and said that he might be opposed to certain features of the bill. In discussion with him later he indicated that they did not want to have the teamsters brought under the act. That is as much information as I can give you on the subject.

SENATOR NEELY. The subcommittee will take a recess until 2 o'clock. (Whereupon, at 12 o'clock noon, a recess was taken until 2 p.m.

AFTER RECESS

At the expiration of the recess the hearing was resumed.

SENATOR NEELY. I just had a telephone conversation with Mr. Backus, who spoke for Mr. Harrison, of the Brotherhood of Railway Clerks. He stated that Mr. Harrison's organization does not desire to be included in the bill.

Mr. McGrath, do you know of any reason why the express companies should not be stricken from the bill?

MR. MCGRATH. No; I don't.

SENATOR NEELY. Mr. Backus informs me that the American Federation of Labor, with which the railroad brotherhoods are identified, is not interested in having the Pullman employees included in the bill. In view of all which, let me suggest that the Pullman Co. and the express companies be excluded.

SENATOR AUSTIN. I have no objection. What about the freight-forwarding companies?

SENATOR NEELY. I have no information on that point. But unless Mr. Rivinus, the general counsel who spoke so eloquently for the Norfolk & Western, or some other interested person objects, we shall eliminate the Pullman Co. employees and express-company employees by unanimous consent." Hearings Before and Subcommittee of the Senate Committee on the Judiciary on Amending the Federal Employers' Liability Act, 76th Cong. 1st Sess. pp. 57, 58 (1939).

The report in the Senate on the bill which ultimately passed states, "The bill as introduced was intended to broaden the application of the act to include express, freight forwarding and sleeping-car companies. Upon the hearings it was clearly shown that there is neither neces-

sity nor demand for the inclusion of these companies in the act. Therefore, they have beeen excluded from the substitute." Senate Committee on the Judiciary, Amending the Employers' Liability Act, S. Rep. No. 661, 76th Cong., 1st Sess.

The significance of this is plain. By the 1939 amendments Congress certainly expanded the coverage of the Act in one direction—the term "person . . . employed" was broadened to include any employee "any part" of whose duties is in furtherance of or substantially affects interstate commerce. Thus were ended the "fine distinctions as to coverage between employees." *Reed v. Pennsylvania R.R.*, 351 U.S. 502 at 505 (1956). The test of employment by a common carrier by railroad was not abolished however. And specific consideration was given to broadening the scope of the Act to include employees in closely related industries. But this was turned down. Congress declined to expand the scope of the Act so as to extend it to activities and facilities intimately associated with the business of common carrier by railroad.

Congress did not lack knowledge of the existence or nature of refrigerator car companies. To begin with, this Court had twice spoken that refrigerator car companies were not common carriers by railroad and thus the sorts of entities subject to regulation under the Interstate Commerce Act, 24 Stat. 379, 49 U.S.C. Section 1, et seq., as amended, with its concept of carrier by railroad. *Ellis v. Interstate Commerce Commission,* 237 U.S. 434 (1915); *U. S. v. Fruit Growers Express,* 279 U.S. 363 (1929).[4] In

4. The year following the 1939 FELA amendments Congress added Section 20 (6) to the Interstate Commerce Act specifically giving the Commission a limited jurisdiction over companies which "furnish cars or protective service against heat or cold." Transportation Act of 1940, 54 Stat. 917, 49 U.S.C. Section 20 (6).

1924, it had also ruled in U.S. ex rel. *Chicago etc. Refrigerator Co. v. I.C.C.*, 265 U.S. 292 (1924) that such companies were not common carriers by railroad within the meaning of the Transportation Act of 1920.

Of paramount significance, however, in considering Congress' knowledge as to refrigerator car companies, is the fact that in the decade of the 1930's Congress passed the following Acts which specifically extend coverage to "any company . . . which operates any equipment or facilities or performs any service . . . in connection with . . . refrigeration or icing . . . of property transported by railroad . . ."

(1) An amendment to the Railway Labor Act, 48 Stat. 1185 (1934), 45 U.S.C., Section 151. The Act as originally passed, 44 Stat. 577 (1926) did not specifically include refrigerator car companies. Congress amended it to do so.

(2) The Railroad Retirement Act of 1934, 48 Stat. 1283, held unconstitutional in *RR Retirement Board v. Alton R.R.*, 295 U.S. 330 (1935).

(3) The Railroad Retirement Act (1935) 49 Stat. 967 (1935) and

(4) The Carriers' Taxing Act, 49 Stat. 974 (1935), both of which were passed in an effort to overcome the constitutional objection to the Act of 1934, and were supplanted by,

(5) The Railroad Retirement Act of 1937 50 Stat. 307, 45 U.S.C. Section 228a et seq. (1937), and

(6) The Railroad Retirement Tax Act, 50 Stat. 435 (1937), Internal Revenue Code of 1954, Section 3231 et seq.

(7) The Railroad Unemployment Insurance Act 52 Stat. 1094, 45 U.S.C., Section 351 et seq. (1938).

The coverage of these acts is, of course, also broad enough to include other activities peripheral to railroading.

They specifically include, for example, express companies and sleeping-car companies.

Thus, in the years immediately preceding the 1939 FELA amendment Congress enacted transportation legislation in the major fields of labor relations and social insurance. In all these laws the peripheral activities—including refrigerator car companies—were specifically included. When it came to amendment of the FELA Congress specifically declined to extend it.

Essentially this same argument was raised before the Court of Appeals. It is noteworthy that plaintiff has not commented on it in his opening brief.

The policy reasons for the Congressional reluctance to extend the Act to new industries are well understood and will be set forth in the next session of this brief. The effect, however, of the failure of the proposed extension should be to eliminate any further contention that the peripheral activities—including refrigerator car companies—are covered. The refusal to pass that part of the bill is conclusive that they are not.

III. There Are No Policy Considerations Favoring Extension of the FELA to New Industries.

The deficiencies of a modified negligence statute as a means for compensating railroad work injuries have been well recognized since the passage of the FELA.

Two years after it passed the FELA, Congress established a commission to investigate the subject of employers' liability and workmen's compensation. This Commission became known as the Sutherland Commission. Its findings reflect the unanimous opinion of the United States Senators, representatives and spokesmen for railroad management and labor who constituted the Commission. They recom-

mended the repeal of the FELA and its replacement by a workmen's compensation law, Sen. Doc. No. 338, 62nd Cong., 2d Sess. (1912).

In fact, a compensation act passed both houses of Congress, but not in the same version, and it was allowed to die in the Senate at the end of the session.[5] Efforts to enact workmen's compensation for railroad workers did not stop, however. Bills were introduced in Congress throughout the remainder of that decade. The decade of the 1920's was one of close scrutiny and study of the situation. Commencing in the 1930's Senator Wagner and others introduced many bills to accomplish this purpose. One of Amici Curiae is the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees (hereinafter referred to as Clerks). This organization is represented as favoring the extension of FELA in this case. It is significant that none of the attorneys for Amici makes reference to any resolution or other official action authorizing such a representation. Be that as it may, the public position of the Clerks, and of their long time president, Mr. George M. Harrison, is well known. In December 1934, Mr. Harrison, then Acting Chairman of the Railway Labor Executives' Association, in an article entitled "Railway Labor Favors Federal Accident Compensation Law,"[6] said that though railway labor organizations constantly have taken the lead in pushing labor legislation through Congress, they have a very poor record with respect to getting a federal compensation law to protect the railway employees when injured while working the line of duty. He said: "The fault lies largely with railway employees themselves... There are still some railroad labor organizations that think

5. 62nd Cong. 2d. Sess. S. Bill No. 6121, H.R. Bill No. 20487.
6. 24 Am. Lab. Leg. Rev. 161 (1934).

an injured employee should have the right to make a choice as between compensation and the right to sue, but these organizations are in the minority."

Then, he said, "a very substantial majority of the unions [are] convinced of the advantages of a compensation act," and that for this reason he believed Congress would "enact such a measure without much delay." This is the same Mr. Harrison, of course, whose name is used in the hearings on the 1939 proposed amendment.

At this same time the Clerks' official position was as follows:

> "Those who favor retention of the present Federal Employers' Liability Act have been deluded by the ease of securing jury verdicts for large amounts in damages in the lower courts, for a case is hardly ever decided against an employee . . .
>
> A compensation law would level off some of the big judgments. There is no doubt about that. But it would also remove the gamble railroad employees must now take in securing a big judgment or none at all. Instead of the long chance of winning a jackpot with the dice loaded against them, compensation for injuries and death would be reasonably certain under a Federal compensation law."[7]

As recently as 1946, the proposal for workmen's compensation for railroad workers received important support from Railway Labor.[8]

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7. *The Railway Clerk*, official organ of the Brotherhood, Vol. 38, p. 329 (1939).

8. A policy statement of the Railway Labor Executives Association appears in Labor and Transportation Program and Objectives of Transportation Labor in the Post-War Period (May 1946): "Railroad labor has advocated and recommended an elective system of benefits for railroad workers to meet the hazards of industrial diseases and railroad accidents. There is no federal system and employees engaged in interstate commerce are not covered by the several states workmen's compensation acts. The establishment of adequate protection should not be further delayed."

One of the reasons for retention of the present Act is that, "vested interests have crystallized around the efforts of railroad workers to secure compensation for their injuries. Representation of claimants is a million dollar business . . ." Pollack, Workmen's Compensation for Railroad Work Injuries and Diseases, 36 Cornell Law Review 236 at 262. See also, Miller, The Quest for a Federal Workmen's Compensation Law for Railroad Employees, 18 Law and Contemporary Problems 188 at 192.

The reasons for all the activity on behalf of a compensation act are well understood. Probably the most objective, best informed and most astute analysis of the Act and its administration is the study by the Railroad Retirement Board, "Work Injuries in the Railroad Industry, 1938—1940 (1947)". The major author of this work is Jerome Pollack. Mr. Pollack summarized the findings of the study and stated his conclusions in two articles appearing in the early 1950's.[9] Some of the Board's important findings will now be discussed.

Lack of certainty of recovery is a fundamental criticism of the Act.[10] FELA claims are still adjusted and litigated as tort claims. Notwithstanding claims to the contrary, many cases are lost. While there is no adequate statistical evidence showing number of cases lost and claims settled for low

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9. Pollack, Workmen's Compensation for Railroad Work Injuries and Diseases, 36 Cornell Law Quarterly, 236 (1951), Pollack, The Crisis in Work Injury Compensation On and Off the Railroads, 18 Law and Contemporary Problems, 296 (1953).

10. It is worth noting that in plaintiff's case temporary disability payments were started and have been paid continuously without even an application being filed with the Compensation Board. This same certainty extends to all benefits available under the California Act including medical treatment (California Labor Code, Section 4600) as well as indemnity payments. (A. 6, 7). Permanent disability payments are available on expiration of temporary benefits. Calif. Labor Code § 4658 Thereafter a lifetime pension is available. Calif. Labor Code § 4658

amounts, some indication is given by perusing the appendices to the Opinions of Mr. Justice Douglas in *Wilkerson v. McCarthy*, 336 U.S. 53 at 71 (1948) and *Harris v. Pennsylvania Railroad*, 361 U.S. 15 at 20 (1959).

There are many other deficiencies in addition to lack of certainty of payments. Delay is a major vice. "Nearly half of the more seriously injured employees had to wait more than a half year before they received any payment at all under the liability law. The Railroad Retirement Board's investigation revealed many waited two or three years for any payment."[11]

Lump sum payment rather than the periodic payments which are characteristic of social insurance laws is a major deficiency.[12] Variation in the level of payments for similar injuries is also present. "An exceedingly wide range of payment for each type of disability seriously diminishes the assurance to any worker that he or his survivors will be justly and adequately compensated."[13]

Another deficiency in the FELA is that it does not concern itself with rehabilitation. In fact, its operations are the antithesis of rehabilitation. The Retirement Board's study shows that the proportion of workers who failed to return to work for the employer was negligible if they

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11. Pollack, Workmen's Compensation for Railroad Work Injuries, 36 Cornell Law Quarterly 236 at 249. By contrast, for example, the California Workmen's Compensation Act, Labor Code, Section 4650 requires payments to commence after seven days unless the injury necessitates hospitalization or lasts beyond 49 days in which case payment is due from the date of injury.

12. Ibid, page 250; a characteristic of Workmen's Compensation is periodic payment. For example, see California Labor Code, Section 4650. In addition, in many jurisdictions the Board administering Workmen's Compensation retains a continuing jurisdiction with power to increase or extend the award. For example, see California Labor Code, Section 5410 providing for an additional award within five years from the date of the injury.

13. Ibid, page 247.

did not file suit. In almost half the cases where suit was filed the employee did not get back to work. The study shows that even attorney representation diminished the probability of return to work.[14]

Settlement procedures are a major difficulty of the system. "Most claims are settled by bargaining between the railroad claim agent and the injured employee. Varying claims, offers, counter-claims and counter-offers are made until a settlement is reached. The law itself creates pressures and fosters tactics which degrade this bargaining in a way that was certainly not contemplated by its framers. The results resemble a lottery; settlements vary from exceedingly large to pitifully inadequate amounts."[15]

In summary, Mr. Pollack found at page 269:

> "The corporeal and moral health of the Federal Employers' Liability Act was given a thorough check-up by the Railroad Retirement Board. That it was found wanting is hardly debatable. Indeed, any objective appraisal of this Act is bound to sound like a denunciation. The Act failed to meet virtually every criterion of a well-designed and equitable compensation system. When an employee is injured, instead of assuring him that his job and compensation rights will be secured, it places him in conflict with the employer jeopardizing both of these rights. Its most glaring inadequacy is the uncertainty and unpredictability of compensation as it affects both the injured employee and the carrier. It arbitrarily handles injured em-

14. By conspicuous contrast see California Labor Code, Section 139.5 establishing within the Division of Industrial Accidents a rehabilitation unit, including an appropriate professional staff, to foster, review, and approve rehabilitation plans and to expedite and facilitate the carrying out of rehabilitation plans. See also the rehabilitation provisions in the Federal Employees Compensation Act, 63 Stat. 862, 5 U.S.C., Section 8104 (1949) and 80 Stat. 539 (1966) 81 Stat. 210, 5 U.S.C. Section 8111 (1967).

15. Ibid, page 237.

> ployees by what amounts to a cruel lottery refusing to pay unlucky employees who have insufficient bargaining power for one reason or another, who may be unfortunate in not having witnesses to support their claims, or who may be simply ignorant of their rights. It permits the employer in some cases to evade responsibility through an obscure and metaphysical claim of non-negligence. In others, it requires the employer to pay several times the actual losses incurred. There is an appalling economic waste in a system which, at the same time that it inadequately compensates most victims of injury, spends disproportionate sums for expenses incidental to litigation."

Outside of the plaintiffs' bar, every major commentator considering the adequacy of the FELA for compensation of work connected injuries has criticized it. Not the least of this criticism has come from this Court. In *Bailey v. Central Vermont Railway,* 319 U.S. 350 (1943), the Court states at 354, "That method of determining the liability of the carriers and of placing on them the costs of these industrial accidents may be crude, archaic, and expensive as compared with the more modern systems of workmen's compensation. But however inefficient and backward it may be, it is the system which Congress has provided." See also Mr. Justice Frankfurter's criticism of the Act in *Wilkerson v. McCarthy,* 336 U.S. 53 at 64, 65 (1948).

Moreover, a review of Congressional enactments in the field of compensation for work connected injuries gives persuasive evidence that the Congressional preference is for a workmen's compensation type system.

(1) The same year as the re-enactment of the FELA, 1908, Congress enacted for the government's employees the Federal Employees' Compensation Act, 35 Stat. 556, (1908). This Act has been amended as recently as 1967, 81 Stat. 212,

5 U.S.C., Section 8143 (a) (1967). Within the coverage of this Act are not only Federal Government employees, but also employees of the District of Columbia (Section 8101(1)(D)), members of the Reserve Officers' Training Corps (Section 8140), Peace Corps volunteers (Section 8142), Job Corps enrollees (Section 8143) and members of the National Teachers Corps, (Section 8143a).

(2) It should not be forgotten that in 1912 both houses passed a workmen's compensation act for the railroad industry. However, the houses were unable to get together on a single version.

(3) The Longshoremen's & Harbor Workers Compensation Act, 44 Stat. 1424, 33 U.S.C., Section 901, et seq. (1927).

(4) The Defense Bases Act, 55 Stat. 622, 42 U.S.C., Section 1651, et seq., as amended (1941).

(5) The Outer Continental Shelf Lands Act, 67 Stat. 462, 43 U.S.C., Section 1331, et seq., (1953) assimilating (in Section 1333) the Longshoremen's Act.

The Jones Act, 41 Stat. 1007, 46 U.S.C., Section 688 (1920) extending to merchant seamen the provisions of the FELA, is the lone exception to this uniform trend of Congressional legislation. At the time of its enactment seamen had traditionally been entitled to maintenance and cure—in effect a limited form of workmen's compensation, and to libel in admiralty for unseaworthiness—a form of liability not subject to the traditional common law defenses. Whatever the reasons for the Jones Act, seven years later Congress passed the Longshoremen's & Harbor Workers' Compensation Act 44 Stat. 1424, 33 U.S.C. section 901 (1927). This Act was passed six months after Mr. Justice Holmes' opinion and the judgment of this Court holding longshoremen entitled to maintain actions under the Jones Act. *International Stevedoring Company v. Haverty,* 272 U.S. 50 (1926). Thus,

Congress well knew that without any further action on its part men employed as longshoremen would have the remedy of the modified negligence statute. Instead Congress chose [in favor of] a compensation scheme for longshoremen—an occupation closely related to merchant seafaring and an integral part of the interstate transportation process.

Furthermore, two federally owned railroads, The Panama Railroad Co.[16] and The Alaska Railroad,[17] were included within the Federal Employees' Compensation Act, thus indicating Congressional approval of a compensation scheme for railroad employees.

Nor can it be said that Congress prefers only *federal* workmen's compensation systems for those engaged in transportation. Thus, by an absence of legislation Congress has left the adjustment of work injuries on interstate trucklines, airlines and buslines to the various state workmen's compensation systems.

The foregoing review and listing indicates both by frequency and recent enactment the Congressional preference for workmen's compensation as a means of adjusting the burdens of work connected injury.

Plaintiff and Amici argue that workmen (including plaintiff) who are exposed to "railroad hazards" should be subject to FELA. Plaintiff takes the matter one step further and urges a "primary duty" test—i.e., "if the primary duty is railroading, then the FELA applies." (Brief, p. 26).

Heretofore General Electric Co.,[18] Ford Motor Co.,[19]

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16. 39 Stat. 750 (1916).

17. Formerly 5 U.S.C., Section 792. See 80 Stat. 553, 5 U.S.C. § 8146 (1966)

18. *Kelly v. General Electric Co.*, 110 F.Supp. 4 (E.D. Pa 1953) afd. 204 F.2d 692 (3rd Cir.) cert. den'd, 346 U.S. 886.

19. *Tilson v. Ford Motor Company*, 130 F.Supp. 676 (E.D. Mich. 1955).

and Armco Steel Corp.[20] have been held not subject to the FELA. From the standpoint of exposure to risks, however, their situation—or the situation of any large user of rail service—cannot be distinguished from the facts shown in this case. Thus in *Kelly v. General Electric Co.*, (supra), plaintiff was run down by a switching engine owned and operated by the defendant. As part of its plant equipment General Electric "has a system of internal trackage some 2.17 miles in length, 2 switching engines used in moving cars within the confines of the plant, 9 specially constructed cars which it rents to rail carriers . . . and 10 other cars used for the housing and exhibition of defendant's products . . . Cars are delivered by the Pennsylvania Railroad to the said siding and thereafter distributed throughout the plant by the switching engines of the defendant." (P.5). In *Tilson v. Ford Motor Co.*, (supra), decedent was employed as a brakeman in defendant's railroad yard located within its Rouge Plant area. (P. 676). Operations were not only conducted within the plant but also occasionally sand was hauled from a sand gantry one half mile away. (P. 678). In *Duffy v. Armco.*, (supra), decedent was a brakeman on one of Armco's train crews. Armco "owns and operates railroad equipment within its manufacturing plant . . . This equipment is used to transport material and equipment from one place to another within the plant and to other plants of the defendant located in the same area over leased rights of way." (P. 738).

Under plaintiff's theory of the case, workers in the foregoing situations will be covered by the FELA. The range of industries potentially subject is a broad one. It includes not only such large industrial users of rail service

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20. *Duffy v. Armco Steel Corporation*, 225 F.Supp. 737 (W.D. Pa. 1964).

but also the private car lines[21] and the suppliers of rail-equipment.

Moreover, under *Reed v. Pennsylvania R.R.*, 351 U.S. 502 (1955) not just those employees exposed to rail hazards but—in a company which is subject to the Act—any employee any part of whose duties furthers or substantially affects interstate commerce would be covered. Thus, combining plaintiff's tests with *Reed,* in any given concern if there is an employee injured in connection with rail equipment or who regularly worked around rail equipment, he will be able to maintain suit under the FELA and thereafter presumably all employees of that firm will be subject.[22]

Alternatively, if not all employees are to be covered, then no matter what it is called, one is reduced to some "test" for determining coverage. Whether it is a test of "exposure to hazards," "primary duty" or "moment of injury," the results will be the same—to create invidious and unjustifiable distinctions among workers as to the treatment of their work connected injuries.

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21. A current issue of The Official Railway Equipment Register lists alphabetically 12 pages in double column of Railroad and private car owners. See The Official Railway Equipment Register, Vol. LXXXII No. 4, April 1967, I.C.C. R.E.R. No. 363.

22. This is apparently exactly the situation now faced by Lone Star Steel Co. See *Lone Star Steel Co. v. McGee,* 380 F.2d 640 (5th Cir. 1967), cert. den'd. —— U.S. —— (1967). Lone Star has substantial rail facility—"a complex system of rail trackage covering several miles . . . owned 8 diesel electric locomotives, 94 cars of railroad rolling stock, and 6 railroad cranes . . . had 57 employees performing duties in connection with its rail facilities." (P. 642) The case stands on its own, however, and is readily factually distinguishable from PFE's situation in that Lone Star was performing the physical movement of goods from place to place for various industries and contractors within its plant complex. (pp. 642, 643). This fact is instrumental in the court's holding that Lone Star is a common carrier by rail. Also, there is no statutory history which suggests an intention to exclude one in Lone Star's situation, as there is in the case of companies peripheral to railroading.

Either way—complete coverage of new industries or selective coverage—if this case be reversed the potential increase in numbers of people subject to FELA is significant and extends far beyond the employees of PFE. This represents a significant breach in the coverage of workmen's compensation and a reversal of the accepted norm for the adjustment of burdens of work connected injuries.

Whatever the merits of a modified negligence statute in 1908, the special status of railroad employees as subject to the FELA is an outmoded concept of the law. "There appears to be no longer any good reason for singling out railroad workers and placing them in a special (privileged or underprivileged, depending on the side of the controversy we are on) group."[23] Still less is it good policy to extend the outmoded concept to new groups of workers.

IV. The Facts of This Case Establish as a Matter of Law That Pacific Fruit Express Is Not a "Common Carrier by Railroad".

It is inapposite that a correct version of the facts should have to be argued to this Court. The basic underlying facts are indeed, not in dispute. Certain of plaintiff's conclusions or labels drawn from the underlying factual data, however, are so erroneous they require analysis and answer. An example of these misleading statements is found in a portion of Plaintiff's Brief appearing on page 26 as follows:

> "Petitioner was employed in a railroad yard where movement of rail cars was occurring, where car maintenance, loading and unloading were taking place, where the interstate transportation of perishable commodities by rail was being effectuated."

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23. Parker, FELA or Uniform Compensation for All Workers, 18 Law and Contemporary Problems, 208 at page 213.

To state that someone is employed in a "railroad yard" where movement of cars is occurring is to imply the typical activity of an operating rail terminal, that is, the making up and breaking up of trains, the classification and assembly of cuts of cars, the provision of service to local industry, and so on. Clearly no such thing is happening in this case. The record does not establish the extent or layout of trackage owned by PFE, but the record does establish that PFE owns only shop tracks and loading tracks. (A.21) It requires a considerable exercise of imagination to construe such facilities as a "railroad yard." To further imply that "movement of cars" is a principal activity in the area leaves a completely misleading picture. Also, there is nothing in this record or in any prior refrigerator car company decision which in any way indicates PFE or any refrigerator car company performs any service in loading or unloading commodities in cars. This entire paragraph is completely without reference to pages of the Appendix or any other source and is completely unsupported by the descriptions of PFE's activities in the affidavit (A.18) and company literature. (A.41)

Another favorite assertion is that PFE controls the movement of cars. (Brief p. 3). The factual basis for this is that tariffs filed by rail common carriers with the Interstate Commerce Commission grant shippers the privilege of diversion or reconsignment in transit.[24] This privilege is an incident of the relationship between the shipper and the railroad. On some occasions a shipper desiring to order diversion calls PFE. PFE, by clerical forces in Chicago, (A.49) using telephones and telegraphs (A.49) communicates the shipper's desire to the railroad. Out of this simple story plaintiff fashions the assertion that PFE controls

24. See Reconsignment Case 47ICC590 (1917). *Central Commercial Co. v. Louisville & Nashville R.R. Co.*, 27 I.C.C. 114, 115 (1913).

the car. Plainly the decision to divert does not originate with PFE and the act itself is not performed by PFE; PFE would not have the right on its own to order any particular handling of the car; and PFE has no physical custody of or contact with the car. It acts on some occasions as a conduit between shipper and carrier. It is difficult to see how such a role can justify plaintiff's assertions.[25] Further, the providing of passing service information (again, by clerical personnel using the telephone) (A.49) hardly seems to be exercising *control* over the car.

Plaintiff asserts that PFE holds itself out to the public as *providing common carriage of perishable commodities by rail.* (Brief, p. 3). The only factual basis for such an assertion is plaintiff's enumeration of various classified telephone directories where PFE appears under the headings of "Railroads" and "Railroad Companies." (Brief, p. 10) This is not only a bald effort to present extra-record material. It is also a shocking jump in logic. Plaintiff could have completed the job of improperly supplementing the record by reproducing the text of the various telephone book advertisements so the Court could judge for itself whether there was a holding out to provide transportation. Instead of doing so one is asked to infer the substance of the "holding out" from the category under which the telephone company placed the ad. One is compelled to ask, who is doing the holding out—the phone company or the advertiser?

Plaintiff is fond of asserting that PFE owns "terminal and service properties and facilities." (Brief, p. 11) This is

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25. A good indication that this is not a new or unusual feature of the refrigerator car company business is the description of it in the photostatic copy of the article from Business Week of December 9, 1939, attached as an appendix to petitioner's brief. Thus, this attempt to inject new facts at this final appellate stage discloses matters which are not new and which have little bearing on the fundamental aspects of the refrigerator car company business.

completely misleading to anyone who understands these words in their accepted sense. In connection with railroads, terminals mean large yards where trains are made up and broken up, where there is a great deal of switching, and from which local industries are served. Patently, PFE owns no such areas and conducts no such operations. On the other hand, the ownership of intraplant trackage and the operation of it by a switch engine for one's own business purposes has never been thought to make one a common carrier by railroad, or to render the trackage located on his premises a "terminal." See cases cited in footnotes 18, 19 and 20.

One can only peruse plaintiff's inapt characterizations and come away with the impression that they are unimportant to the decision of the case. The essential features of the operations of a refrigerator car company are well understood. They are: (1) to own and lease refrigerator railroad cars and (2) to provide protective services (e.g., icing) to such cars. (A.18) It is impossible to believe that providing a telephone service for the transmission of car diversion orders or publishing a brochure advertising the advantages of your car fleet (A 37-40) can be anything more than details of the operation. The same can be said for statistics on car miles or operating revenues, or the number of ice plants any given company operates.

Given an understanding of the activities of refrigerator car companies it is proper to make some analysis of the authorities offered by plaintiff.

Plaintiff places main reliance on the so-called terminal company cases. Great stress is placed on *Parden v. Terminal R. of Alabama,* 377 U.S. 184 (1964). Any fair reading of this Court's Opinion discloses that it had to do with the constitutional immunity of the State of Alabama, not with what constitutes a common carrier for FELA purposes. It

is, however, instructive to compare PFE's operations with this Court's preliminary description of the operations of the Terminal Railroad of Alabama. The Court states:

> "Consisting of about 50 miles of railroad tracks in the area adjacent to the State Docks at Mobile, it serves those docks and several industries situated in the vicinity, and also operates an interchange railroad with several privately owned railroad companies."

This is the crux of the matter. The terminal railroad had an operating railroad. It used this railroad to perform a *transportation service for others*—e.g., customers with inbound and outbound shipments at the docks, the various industries located on its line and common carriers with whom it had connections. PFE—and refrigerator car companies—perform no such service. PFE does not switch for any industries—either for profit or otherwise. PFE does not perform an interchange service for railroads. PFE does not, with its own locomotive power and crews, spot cars and make pick ups—i.e., perform the physical operations of switching service—at any docks or for any industrial customers. (A. 18-23). This is not only an immediately apparent factual difference in the two types of operations, it is the most fundamental possible difference. The performance of an industrial switching service and an interchange service constitutes the very heart of any terminal railroad's business.

Without belaboring the point it must be apparent the two situations are factually distinguishable on an essential point. The terminal company cases, to the extent they constitute a line of authority under the FELA, are not a good analogy for the refrigerator car industry. The same must be said for *U.S. v. Brooklyn Terminal,* 249 U.S. 296 (1919), relied on by plaintiff. In the first place this is a decision

under the Hours of Service Act, an Act with a different statutory history (particularly in regard to the 1939 amendment) than the FELA. More importantly, the defendant "operates a union freight station. From the railroads it receives . . . freight and transports the same . . . to its Brooklyn docks. There, the cars . . . are hauled from the car floats by its locomotives and placed for unloading . . . The Terminal receives likewise from shippers . . . outgoing freight." (P. 301). The Brooklin Terminal Company was performing physical and operational transportation for others—a service which refrigerator car companies do not perform.

In *Union Stock Yard Co. v. U.S.*, 308 U.S 213 (1939) the question was coverage of the Interstate Commerce Act, an Act with a vastly different purpose and statutory history than the FELA. This Court noted that Section 15 (5) of the Act as it then existed specifically included all necessary service of unloading and reloading of livestock, the service which Union Stock Yard performed. Moreover, the Court found "appellant's stockyard is a terminal of the line haul carriers, and that it performs their railroad terminal services" within the Act as construed. (P. 219) This Court distinguished *Ellis v. Interstate Commerce Comm'n*, 237 U.S. 434 (1915), which held refrigerator car companies were not within the coverage of the Interstate Commerce Act. Because there is no question here of PFE performing any loading or unloading function or any terminal services, and because of the different purposes and statutory history of the Interstate Commerce Act and the FELA, the cases must be distinguished.

Plaintiff also relies on *Fort Street Union Depot v. Hillen*, 119 F.2d 307 (6th Cir. 1941). This case at least is a clear cut FELA holding. Here the terminal railroad "makes up and breaks up trains . . . switching them within the depot yards and transferring freight, express and baggage . . ."

(P. 309, 310) This, of course, is exactly what PFE does not do, and the case thus is not good authority for characterization of the refrigerator car industry.

CONCLUSION

This Case Was Properly Resolved by Summary Judgment.

Questions as to which industries come within the scope of coverage of the FELA and are "common carriers by railroad" should be questions of law to be decided by the courts and not juries. If scope of coverage in this context is to be left to the fact finder the Act will become extremely difficult to administer because there will be uncertainty in the minds of both employer and employee as to whether the applicable law is FELA or a workmen's compensation statute until the question is resolved by a fact finder. The resolution under such circumstances could be different in each case. The normal results of such a situation would be more litigation, fewer settlements, increased delay in payment of benefits and increased expense of administration of the Act and workmen's compensation acts.

Both plaintiff and Amici contend that the Act should be liberally construed so as to bring the respondent within its coverage. In support of this they claim this Court has been liberal in the past in its treatment of this Act. The liberal construction of the Act by this Court has been on questions of fact, securing a jury trial and proximate cause, for those who were admittedly subject to the Act. This liberal construction has been necessitated by the fact that the Act is grossly inadequate to the needs of railroad employees involved in work injuries. See Mr. Justice Frankfurter's concurring opinion in *Wilkerson v. McCarthy*, 336 U.S. 53 at pages 65-66 (1948).

> "These observations are especially pertinent to suits under the Federal Employers' Liability Act. The diffi-

culties in these cases derive largely from the outmoded concept of 'negligence' as a working principle for the adjustments of injuries inevitable under the technological circumstances of modern industry. This cruel and wasteful mode of dealing with industrial injuries has long been displaced in industry generally by the insurance principle that underlies workmen's compensation laws. For reasons that hardly reflect due regard for the interests of railroad employees, 'negligence' remains the basis of liability for injuries to them. It is, of course, the duty of courts to enforce the Federal Employers' Liability Act, however outmoded and unjust in operation it may be. But so long as negligence rather than workmen's compensation is the basis of recovery, just so long will suits under the Federal Employers' Liability Act lead to conflicting opinions about 'fault' and 'proximate cause.' The law reports are full of unedifying proof of these conflicting views, and that too by judges who seek conscientiously to perform their duty by neither leaving everything to a jury nor, on the other hand, turning the Federal Employers' Liability Act into a workmen's compensation law."

Beyond what has been stated this Court has not had a liberal policy of extending the Act to new areas already covered by more desirable laws of workmen's compensation.

The judgment of the lower court should be affirmed.

Dated, San Francisco, California, January 29, 1968.

Respectfully submitted,

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DONALD O. ROY
Attorneys for Respondent

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1967

No. 465

ELISHA EDWARDS,
Petitioner,

vs.

PACIFIC FRUIT EXPRESS COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

INTRODUCTION

Respondent has attempted to shift the focus of this case from an analysis of the scope of the Federal Employers' Liability Act by mounting an assault upon that Act and its history of broad remedial application. Such an obvious effort to distort the question at issue here serves only to reinforce petitioner's position that Pacific Fruit Express operates wholly within the railroad industry and identifies itself with the self-interest of the nation's common carriers by railroad. If respondent truly considered itself to have

some status independent of the carriage of perishable commodities by railroad, why then the need to pillory and excoriate the most humanitarian injury legislation yet enacted by Congress?

The broad reach and liberal intention of the F.E.L.A. are beyond doubt. Cf. *Urie v. Thompson*, 337 U.S. 163 (1949), demonstrating the integrated nature of federal remedies for railroad workers. Respondent devotes its most emphatic arguments to espousing that type of "hostile philosophy" against which this Court has so firmly stood. See *Wilkerson v. McCarthy*, 336 U.S. 53, 69 (1948) (concurring opinion).

I. PACIFIC FRUIT EXPRESS IS AN INTEGRAL PART OF THE RAILROAD INDUSTRY AS ENCOMPASSED BY THE F.E.L.A.

Railroads in the United States have handled the transportation of foodstuffs and other commodities requiring protection against heat and cold for over one hundred years. (A. 41.) Neither the record nor the brief for respondent reveal a single operation of Pacific Fruit Express which is not solely and entirely associated with the transportation of freight by railroad. While some railroad corporations perform their own protective service operations, others delegate this aspect of the services which they offer to subsidiary companies, retaining varying degrees of control over the operations.[1] Pacific Fruit Express has been de-

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[1]Report of the Interstate Commerce Commission, 318 I.C.C. 111 (1962), *Contracts for Protective Services* [hereinafter cited as I.C.C. 1962 Report]. The New York Central Railroad, for example, performs much of its own refrigeration operations. *Id.*, at 122.

scribed as a "creature of the . . . railroads"[2] whose operations are limited to those protective services required of full service railroad carriers. "Protective service against heat or cold where necessary for the preservation of perishable commodities in transit, is a duty of a common carrier by railroad for which it is responsible to the shippers of such commodities."[3] Customarily, refrigerated rail cars have been owned both by operating railroads and specialized car-line and car-service companies (usually owned by one or more full-service railroads), and occasionally by shippers of perishable commodities.[4]

The Interstate Commerce Commission in 1941 observed that Pacific Fruit Express

> does nothing which is not embraced within the duty of a carrier by railroad to the public which it serves. It owns and maintains refrigerator cars which the railroads use, and it also performs certain services for railroads in connection with the protection against heat or cold of perishable shipments. It is, in short, an agency which affords a convenient means of pooling a special type of railroad equipment and of furnishing for a group of railroads collectively certain services which require specialized and concentrated attention. It

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[2]Report of the Interstate Commerce Commission, 246 I.C.C. 145, 154 (1941), *Contracts for Protective Services* [hereinafter cited as I.C.C. 1941 Report], discussing the rate arrangements between P.F.E. and its owners.

[3]I.C.C. 1962 Report, *supra* note 1, at 112. Cf. *Cudahy Packing v. Grand Trunk Western Ry.*, 215 Fed. 93 (7th Cir. 1914); *Alton & S. R. v. United States*, 49 F.2d 414 (N.D. Calif. 1931).

[4]Report of the Interstate Commerce Commission, 56 I.C.C. 449, 454-455 (1920), *Perishable Freight Investigation.*

> [is] such an agency for convenient collective handling of an accessorial railroad service . . . .[5]

It is readily apparent that various functions wholly within the railroad industry are commonly undertaken by separately chartered corporations, sometimes owned by a single operating railroad or railroad holding company and occasionally independently owned. Each of the terminal companies, railroad stockyards, belt lines—and Pacific Fruit Express—in essence "forms a link in this chain of transportation. It is necessary to complete the avenue through which move

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[5] I.C.C. 1941 Report, *supra* note 2, at 154-155. The Commission indicated that it was bound by judicial interpretation of the status of car leasing companies as other than common carriers by railroad. It was stated in *U.S. ex rel. Chicago, N.Y. & Boston Refrigerator Co. v. I.C.C.*, 265 U.S. 292, 296 (1924), that the particular "car company" was "not a carrier by railroad, or, indeed, a common carrier at all." The Chicago Refrigerator Co. owned 1340 refrigerator cars, which it rented, but did not own or control any railroad property or facilities aside from the cars. 265 U.S. at 293-294. It does not appear to have serviced the cars either while they were in use or between journeys. Thus the company was excluded from the Transportation Act of 1920, 41 Stat. 456, 464.

Early Interstate Commerce Act and Transportation Act decisions are inapposite to the instant matter and will be considered *infra*. Noteworthy here, however, is the fact that the Interstate Commerce Commission seems to have classified refrigerator car lines and protective service operations separate from railroads generally only because of the early judicial actions regarding these companies. The Commission had earlier bowed to the expression by the courts in this matter. "Under the law as construed by the courts, car lines and others engaged in leasing cars to shippers are not common carriers and thus do not come under direct control by the Commission." Report of the Interstate Commerce Commission, 50 I.C.C. 652, 677 (1918), *In the Matter of Private Cars*. The I.C.C. 1941 Report, *supra*, clearly shows the more modern tendency of the Commission to link these operations inseparably with the railroad industry.

shipments over these lines . . . ."[6] That these various functions exist within the industry was given recognition by congressional description in the F.E.L.A. of "cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." Within this context, respondent cannot reasonably escape F.E.L.A. liability by characterizing itself vaguely as "closely related to railroading . . . yet not railroading itself."[7] Such a specious distinction does not survive comparison with historical reality.

Pacific Fruit Express, and other similar railroad-owned enterprises,

> were organized chiefly for the purpose of looking after perishable freight originating on the lines of their owners, and . . . *they are really a separate department of such carriers.* Separate incorporation . . . is a convenience in accounting and operation. It seems quite probable that one strong inducement for the incorporation of some of them was that at the time mileage earnings were much greater than had been received from the per diem allowance . . . . Report of the Interstate Commerce Commission, 50 I.C.C. 652, 661 (1918), *In the Matter of Private Cars.* (Emphasis added.)

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[6] *Southern Pacific Terminal Co. v. Interstate Commerce Commission,* 219 U.S. 498, 522 (1911).

[7] Brief for the Respondent, 8. This type of "fine distinction" has never before been used to circumscribe the railroad industry; on the other hand, such indefinable subtleties are plainly analogous to the "fine distinctions as to coverage between employees" dismissed by this Court in giving full expression to the liberal intentions of Congress in amending and re-enacting the F.E.L.A. in 1939; the amendment "evinces a purpose to expand coverage substantially as well as to avoid narrow distinctions in deciding questions of coverage." *Reed v. Pennsylvania R. Co.,* 351 U.S. 502, 506 (1956).

P.F.E. performs those services and provides those facilities to the extent that the many railroad companies with which it contracts are obligated therefor.[8] P.F.E. was organized by railroads to serve the shipping public by conducting a portion of the function of the railroads.[9] The range of these activities has been detailed earlier[10] and is well documented in the Appendix. The services provided by P.F.E. are essential to the railroad industry, and under no rational view can they be considered a separate or distinct industrial operation.[11]

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[8]Report of the Interstate Commerce Commission, 253 I.C.C. 21, 33 (1942), *Contracts for Protective Services.*

[9]In this context, it is interesting to note the often overlooked provision of 45 U.S.C. § 57. Also enacted in 1908 as part of the F.E.L.A., this statute provides that the phrase "common carrier" includes the "receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier." While this section was obviously intended to prevent harm to railroad workers which might result if a railroad were leased or placed in receivership, the intent of Congress is plain to prohibit discrimination against employees because the railroad might operate through different hands.

[10]See Brief for the Petitioner, 6-14.

[11]Respondent's efforts to isolate and narrow its own operations are without merit. While admitting, for example, that it owns "shop tracks and loading tracks" (Brief for Respondent, 28), later in the same paragraph it is denied that P.F.E. "performs any service in loading or unloading commodities in cars." Petitioner has no knowledge of whether P.F.E. ever actually places the perishable commodities in the cars; however, it is stated by respondent that close to 1,300,000 tons of ice annually are *loaded* into the ice compartments of the cars as they travel across the country with their cargos. (A. 43-44.) More specifically, petitioner's own job as an iceman included "loading and unloading ice in bodies of cars . . . ." (A. 22.)

P.F.E. does move rolling stock with its own shop engines to effect the repair of cars in P.F.E. shops and the furnishing of protective services. (A. 22.) In *Gaulden v. Southern Pacific Co.*, 78 F.Supp. 651 (N.D. Calif. 1948), aff'd 174 F.2d 1022 (9th Cir.

> [The F.E.L.A.] relates to common carriers by railroad engaged in interstate and foreign commerce . . . . It is intended in its scope to cover *all commerce* to which the regulative power of Congress extends.[12]
>
> The purpose of this bill is to change the common-law liability *of employers of labor in this line of commerce* . . . .
>
> These sections make the employer liable for injury caused by defects or insufficiencies in the roadbed, tracks, engines, machinery, and other appliances *used in the operation of railroads.* H. R. Rep. 1386, 60th Cong., 1st Sess. 1-2 (1908). (Emphasis added. R. 50-51.)

Respondent does not expressly deny that it is a common carrier, and it cannot reasonably do so. That its descriptive publications (A. 37-50) are distributed freely to the general public attests to its public or

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1949), the plaintiff was injured while a P.F.E. car was being moved from a loading platform. (A. 10.) Although not explicitly stated in the record, one cannot but infer that the movement of cars for icing purposes must include instances where the cars are already loaded with the shipper's product. These car movements, while unique to the area of protective services, are closely related to the service operations associated with the operation of railroad terminals.

[12]This Court recently recalled this language as "further indication of the congressional desire to cover all rail carriers that constitutionally could be covered . . . ." *Parden v. Terminal R. of Alabama Docks Dept.*, 377 U.S. 184, 187 n. 5 (1965). This construction finds further support in the report accompanying the Senate version of the proposed 1908 bill: "The proposed measure avoids that criticism [in the Employers' Liability Cases, 207 U.S. 463 (1908)] by confining the application of its provisions to the employees of common carriers which are within the regulative power of Congress over commerce while employed by such carrier in such commerce. In other respects the proposed measure follows in substance the act which was passed two years ago." S. Rep. 460, 60th Cong., 1st Sess. 1 (1908).

common calling.[13] Such evidence as may be furnished by commercial publications—including directory listings—must logically be considered highly illuminating.[14] This Court, however, has determined without recourse to any specific public holding out that various enterprises in the railroad industry are common carriers by railroads. See, for example, *Union Stockyard v. United States,* 308 U.S. 213, 220-221 (1939); *United States v. Brooklyn Eastern District Terminal,* 249 U.S. 296 (1919). Thus when respondent, in its own affidavit, specifically asserts that "PFE supplies refrigerator cars to any railroad in the United States desiring to use them . . . ." (A. 19),

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[13]Advertisements—by railroad companies specifically—have been found to constitute admissions against interest to be treated the same as any other such declaration; such evidence is not rendered any less competent by a contention that it was only an advertisement to catch the credulous public. *Southern Pacific v. Godfrey,* 48 Tex.Civ.App. 616, 621, 107 S.W. 1135 (1908); *Southern Pacific v. Allen,* 48 Tex.Civ.App. 66, 106 S.W. 441 (1908); Cf. *Lynch v. Bekins Van & Storage,* 31 Cal.App. 68, 159 Pac. 822 (1916); *Stringer v. Davis,* 35 Cal. 25 (1868).

Respondent offered no objection to the introduction of its advertising circulars in the District Court.

[14]Respondent's suggestion that perhaps the telephone companies across this country—rather than respondent—are "doing the holding out" (Brief for Respondent, 29) is without merit. P.F.E. is not compelled to acquire any classified telephone directory listings—especially if it does not endeavor to solicit business from the general public. Secondly, it is obvious that telephone companies must assign their classified headings in a manner consistent with commercial usage.

The use of telephone directory listings as corroborating evidence is not novel. *E.g., Arrow Aviation v. Moore,* 266 F.2d 488 (8th Cir. 1959); *Hood v. Bekins Van & Storage,* 178 Cal. 150, 172 Pac. 594 (1918). "We are of the opinion . . . that the fact that the regular issues of the directory of the telephone company are 'brought home to the public' is a matter of such common knowledge that there was no necessity for testimony with respect thereto." *Barron v. Board of Dental Examiners,* 44 Cal.App.2d 790, 795, 113 P.2d 247 (1941).

it again professes its common calling.[15] While respondent's concept of "common carrier by railroad" is indeed vague and elusive, P.F.E. is in every particular described by those words in their ordinary accepted usage.

II. INCLUSION OF P.F.E. WITHIN THE F.E.L.A. PRESERVES THE UNIFORM APPLICATION OF REMEDIAL RAILROAD LEGISLATION

The first paragraph of § 1 of the F.E.L.A. has stood unaltered since 1908. The task of determining the scope of the qualifying language, "common carrier by railroad", has fallen to the judiciary. Congress, however, has given clear indications that the Act is to be construed broadly and applied liberally.

The Interstate Commerce Act as amended in 1906 applies, inter alia, to "common carriers engaged in the transportation of passengers or property wholly by railroad . . . ." 34 Stat. 584, 49 U.S.C. § 1(a). All instrumentalities used in the transportation of persons or goods by rail are included within the term railroad." *Id.* at § 1(3). "Transportation" as used in the Act specifically includes "refrigeration or icing." *Id.* One who is engaged in the performance of a "railroad transportation service" is thus a carrier, and is a common carrier by railroad if the services are performed "as a common or public calling." *Union Stockyard v. United States, supra,* 308 U.S. 213, 218-

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[15]The affidavit of W. G. Cranmer also states that respondent rents its cars "to practically all railroads in the United States, Canada and Mexico. P.F.E. also furnishes protective services . . . to commodities carried in said cars . . . ." (A. 18.)

220 (1939).[16] While the Interstate Commerce Act does not, on its face, purport to control the breadth of the F.E.L.A., it is indeed significant that the general descriptive language regarding the railroad industry is strikingly similar.

With only minor variations in phrasing, the same broad concepts of common carrier, transportation, and railroad appear in each statute in Title 45 enacted as remedial legislation for the protection of working men in the railroad industry. Moreover, this Court has consistently used the same standards of inclusion in construing the Interstate Commerce Act,[17] the Hours of Service Act,[18] the Railway Labor Act,[19] the Federal Safety Appliance Acts,[20] and the Federal Employers' Liability Act,[21] thereby demonstrating the interrelationship of these statutes. As the court in *Bush v. Brooklyn Eastern District Terminal,* 218 N.Y.S. 516, 517, 218 App. Div. 782 (1926), so aptly reasoned:

> We think it was necessary to decide that the defendant was a common carrier by railroad in

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[16]This Court in *Union Stockyard* distinguished *Ellis v. Interstate Commerce Commission,* 237 U.S. 434 (1915), upon which respondent relies, on the basis that the record in *Ellis* contained "no allegation or proof that the corporation was engaged in a common calling or held itself out as ready or willing to supply cars or services on reasonable request." 308 U.S. at 221.

[17]*Union Stockyards v. United States, supra,* 308 U.S. 213 (1939).

[18]34 Stat. 1415, 49 U.S.C. § 61; *United States v. Brooklyn Eastern District Terminal Co., supra,* 249 U.S. 296 (1919).

[19]48 Stat. 1185, 45 U.S.C. § 151; *California v. Taylor,* 353 U.S. 553 (1957).

[20]27 Stat. 531, 45 U.S.C. § 1 et seq.; *United States v. California,* 297 U.S. 175 (1936).

[21]*Parden v. Terminal R. of Alabama Docks Dept., supra,* 377 U.S. 184 (1965).

> order to apply to it the Hours of Service Act, as was done by the United States Supreme Court . . . . We think it could not be a common carrier within that act, and not be a common carrier within the provisions of the FELA.

Respondent misconceives the significance of statutory references to refrigeration by suggesting that Congress sees refrigeration as an operation separate from the common carriage of goods by rail. The Railway Labor Act, 45 U.S.C. § 151, provides that the term "carrier" encompasses express companies, sleeping car companies, and carriers by railroad. The Act also extends to

> any company which is directly or indirectly owned or controlled by or under common control with any carrier *by railroad* and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, *refrigeration or icing*, storage, and handling *of property transported by railroad* . . . (Italics added.)

Congress thus has declared that refrigeration services (like railroad terminal or stockyard operations) are a function of common carriage by railroad while express and sleeping car operations are distinct and separate. The 1939 action of the Senate Committee on the Judiciary in deciding to delete a casually proposed inclusion of express companies, freight forwarders and sleeping car companies in the F.E.L.A. is quite consistent with the prior Congressional view of the railroad industry. It is most significant that the draft

bill before the committee did not mention refrigeration or icing, nor was that subject raised during Committee hearings.[22]

The fact is simply that Congress has never found it necessary to supplement the phrase "common carrier by railroad."[23] The business of freight forwarders and express companies can easily be distinguished from the operations of Pacific Fruit Express.[24] These businesses stand in relation to railroads essentially as shipper to carrier. Without these companies, the railroad industry could, without adjustment, continue to provide the same services to the

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[22]S. Rep. 661, 76th Cong., 1st Sess. 2 (1939). See also Hearings Before the Subcommittee of the Senate Committee on the Judiciary on Amending the Federal Employers' Liability Act, 76th Cong., 1st Sess. (1939). Neither did the Committee discuss or consider any of the services or facilities encompassed in the decisions of this Court in the terminal, belt line, or stockyard cases.

[23]As noted earlier, questions of inclusion under the F.E.L.A. have been left to judicial interpretation. As is frequently the case, Congressional inaction may be subject to a variety of conflicting interpretations. See generally *Wong Yang Sung v. McGrath*, 339 U.S. 33, 47 (1950); *Girouard v. United States*, 328 U.S. 61 (1946). While the court below commented on the lack of Congressional action since *Gaulden v. Southern Pacific Co., supra*, 78 F.Supp. 651 (N.D. Calif. (1948), aff'd 174 F.2d 1022 (9th Cir. 1949), the language of this Court in *Girouard* is apt: "The silence of Congress and its inaction are as consistent with a desire to leave the problem fluid as they are with an adoption by silence of the rule of those cases." 328 U.S. at 70.

[24]Express and freight forwarding companies, however, are common carriers. The opinion in *Wells Fargo v. Taylor*, 254 U.S. 175, 176 (1920), begins with the description of the express company as "a common carrier by express." A freight forwarder collects, ships and distributes less than carload shipments of freight employing the services of various types of carriers; it too is classified as a common carrier. *Latsko v. National Carloading Corp.*, 192 F.2d 905, 909 (1951). Because these companies do not operate their own railroad transportation equipment, they have been exempted from the F.E.L.A.

general public which it now does. Without Pacific Fruit Express and its class of operations, however, the entire railroad industry would be disrupted as it struggled to provide the same protective facilities and services. Without express companies or freight forwarders, persons desiring to ship small parcels would be required to endure the slight inconvenience of delivering the freight directly into the hands of the carriers and, perhaps, picking the items up at their destination. Without refrigerator cars and protective services, however, the shipper of perishable commodities would be utterly unable to transport his goods by rail.

Judicial interpretation of the scope of the Employers' Liability Act has generally paralleled the boundaries implicitly described by Congress, with the notable exception of the few court decisions giving rise to the present controversy. Respondent attempts to dismiss the line of terminal, belt line and stockyard cases decided by this Court as generally arising under different remedial legislation. In turn, respondent relies in its brief upon a series of decisions which have essentially lost whatever vitality they may once have had. *Ellis v. Interstate Commerce Commission, supra,* 237 U.S. 434 (1915); *United States ex rel. Chicago etc. Refrigerator Co. v. I.C.C., supra,* 265 U.S. 292 (1924); and *U. S. v. Fruit Growers Express,* 279 U.S. 363 (1929). Each of these cases dealt with questions long put to rest by the monumental changes which have since occurred in the area of interstate commerce, not the least of which was the amendment

of the Interstate Commerce Act in 1940, 54 Stat. 898 et seq., providing a completely integrated regulatory system over common carriers in the United States.[25] In none of these cases was the F.E.L.A.—or any worker benefit—at issue. In each, the intent of the court to diminish rather than expand the impact of Congressional regulation was evident. All three were basically nullified by the 1940 amendments to the Interstate Commerce Act, 54 Stat. 917, which required the companies involved to report to the Commission in the same manner as all other instrumentalities of interstate common carriage in the United States.

Ellis was distinguished by this Court and is plainly inapposite in view of the abundant evidence of the public nature of P.F.E.'s activities.[26] The *Chicago Refrigerator* case represented an attempt by a lessor of rail cars (providing no other facilities or services) to obtain additional compensation for the use of its equipment by the United States government. Aside from the fact that this opinion does not analyze the public or private nature of that car company's offering to the railroads, the case is of so little moment that this Court has cited the decision but once.[27] In *United States v. Fruit Growers Express Co.*, the government sought to prosecute F.G.E. for fraud in

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[25] *United States v. Pennsylvania R. Co.*, 323 U.S. 612 (1944).

[26] See n. 16, *supra*.

[27] *United States v. American Railway Express Co.*, 265 U.S. 425 (1924), holding that an express company was not a common carrier by railroad within the Transportation Act of 1920. Subsequently, this Court has never found it necessary to distinguish Transportation Act cases in approaching problems under the F.E.L.A. and companion acts.

the provision of protective services.[28] The tone of the entire opinion makes it apparent that the government did not allege that Fruit Growers Express was itself a common carrier. It was simply undisputed that F.G.E. independently contracted with various carriers by railroad; neither the parties nor the court found any need to explore or define F.G.E.'s status in any greater detail.

Respondent insists upon narrow application of the F.E.L.A. by urging the *in terrorem* proposition that liberal construction of the Act will "create invidious and unjustifiable distinctions among workers as to the treatment of their work connected injuries." (Brief for the Respondent, 26.) It is, of course, exactly this type of unjustifiable distinction which petitioner attacks herein: denying federal protection to a railroad working man doing the same work with the same instrumentalities as a substantial proportion of workmen protected by the F.E.L.A. Petitioner believes that all employees in the railroad industry participating in the carriage of goods, sharing as they do the same hazards peculiar to that industry, should be afforded the humanitarian and remedial protections

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[28]Respondent has commented upon the fact that F.G.E.'s operations have been variously described. (Brief for the Respondent, 7 n. 2.) In fact, the opinion of this Court credits F.G.E. only with performing protective service operations and makes no mention of ownership of any cars. In *Hetman v. F.G.E.*, 346 F.2d 947, 949 (3rd Cir. 1965), on the other hand, the court specifically noted that plaintiff's decedent therein was employed by Rubel Corporation and that, while F.G.E. contracted for protective services to railroads, it "engages Rubel to perform the service. . . , The defendant [F.G.E.] had no control over the 'icing' operation in which the decedent was employed nor did it attempt to exercise any control."

of federal railroad legislation. It is not true that the proper liberal application of the F.E.L.A. will result in application of the Act to others than common carriers by railroad. Respondent misconstrues the holding of *Reed v. Pennsylvania R. R., supra,* 351 U.S. 502 (1955), which simply represents a finding that the plaintiff therein was closely and substantially involved in facilitating interstate commerce by railroad.

Lone Star Steel Co. v. McGee, 380 F.2d 640 (5th Cir. 1967), cert. den. ..... U.S. ..... (December 4, 1967), represents the most cogent modern analysis of the tests to be applied logically in the quest for the boundaries of the F.E.L.A.[29] After determining that the terminal facility and short line railroad cases are determinative of the status of *Lone Star,* the court stated:

> According to these cases various considerations are of prime importance in determining whether a particular entity is a common carrier. First—actual performance of rail service, second—the service being performed is part of the total rail service contracted for by a member of the public, third—the entity is performing as part of a system of interstate rail transportation by virtue of common ownership between itself and a rail-

[29]Respondent does not discuss the standards described in *Lone Star Steel* but seeks to distinguish the decision because the company moved cars for the convenience of other businesses located within its plant grounds. The fourteen entities within the plant, although independently owned, "are integrated with the over-all operation of Lone Star" performing necessary auxiliary services. 380 F.2d at 642. All of Lone Star's railroad operations take place on its own property, yet it falls within the F.E.L.A. because its rail services "are a part of the total rail transportation contracted for and required by the industries located on its plant site." 380 F.2d at 647.

road or by a contractual relationship with a railroad, and hence such entity is deemed to be holding itself out to the public, and fourth—remuneration for the services performed is received in some manner, such as a fixed charge from a railroad or by a percent of the profits from a railroad. 380 F.2d at 647.

Unquestionably Pacific Fruit Express satisfies each of the four conditions for F.E.L.A. inclusion.[30]

CONCLUSION

While government has rarely ever adopted a measure designed as a solution of some important social problem that could not be improved with time and experience, there has not yet been found any method of compensating injured railroad men and their next of kin that can be substituted satisfactorily for that provided by Congress in the FELA and the group of laws designed to supplement it. It has proved worthy to stand beside and in a position of equality with the remedies open to seamen, both in admiralty and in the law courts. Griffith, *The Vindication of a National Public Policy Under the Federal Employers'*

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[30]The court did not attach liability to Lone Star by piercing or disregarding its separate incorporation from the T & N Railroad. Rather, it was the fact that "the operations of the two are highly integrated and mutually dependent" that compelled the conclusion that Lone Star was part of a comprehensive rail transportation system. 380 F.2d at 648. The court also "specifically rejected as a controlling criterion the status which the entity declares itself to be in determining whether the entity is a common carrier." *Id.*

While Lone Star admitted that it was a carrier by rail but denied that it was a *common carrier by rail*, respondent has not been so candid.

Liability Act, 18 LAW AND CONTEMPORARY PROBLEMS 160, 187 (1953).

The Federal Employers' Liability Act is unquestionably one of the monumental compensation statutes and scarcely requires apologists before this Court. Respondent's impolitic scorn for this statute is most assuredly not motivated by any deep concern for the welfare of its employees or for railroad workmen generally. Rather, P.F.E. endorses the destruction of a system which attempts full compensation for railroad workers. While respondent boasts (without citation to the record herein) of its voluntary payment of minimal benefits to petitioner "without even an application being filed with the Compensation Board," it not surprisingly neglects to mention existing *federal* provisions which supplement and sustain the protections in the F.E.L.A. with additional guarantees of disability benefits.[31] P.F.E. asks in this case that the humanitarian principles developed in the sixty year history of the F.E.L.A. be ignored. Nor does P.F.E. stop with suggesting its own exclusion. Rather, wholesale abandonment of the F.E.L.A. for

[31]Brief for the Respondent, 19 n. 10. "Another factor which doubtless influences the railroad workers [in their support of the F.E.L.A. and opposition to workmen's compensation] is the sickness insurance provided under the Railroad Unemployment Insurance Act, 52 Stat. 1094 (1938), as amended, 45 U.S.C. §§ 351-367 (1958), as amended (Supp. II, 1959-60) and the disability and survivor's benefits under the Railroad Retirement Act, 49 Stat. 967 (1935), 50 Stat. 307 (1937), as amended, 45 U.S.C. 228a-228z (1958), as amended (Supp. II, 1959-60)." Brodie, *The Adequacy of Workmen's Compensation as Social Insurance,* 38 WISCONSIN LAW REVIEW 57, 87-88, n. 121 (1963). The Unemployment Insurance Act provides for temporary disability benefits for injury within the term "sickness." 45 U.S.C. 352.

the entire railroad industry is suggested, thereby subjecting railroad workers to schemes where "the amount of compensation awarded may be expected to go not much higher than is necessary to keep the worker from destitution."[32] Moreover, to exempt P.F.E. or any such function of the railroad industry from the F.E.L.A. is to entrust safety practices and improvements to the discretion of the individual company itself. Such confusion and lack of external standards is unthinkable in an industry wholly subject to federal regulation.[33] That respondent can so un-

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[32] 1 Larson, WORKMEN'S COMPENSATION LAW § 2.50, p. 11 (1966). The Larson work, an often cited multi-volume treatise on the law of workmen's compensation extols the fact that workmen's compensation "does not pretend to restore to the claimant what he has lost; it gives him a sum which, added to his remaining earning ability, if any, *will presumbly enable him to exist without being a burden to others.*" *Id.*, italics added. See also, Note, *Rehabilitation Within the Workmen's Compensation Framework*, 19 ALABAMA L. REV. 401, 403 (1965).

Richter and Forer suggest that the only proper method to cure present criticism of the federal system would be to *add* a program of guaranteed workmen's compensation, duplicating the system which was developed in England. Richter and Forer, *Federal Employers' Liability Act—A Real Compensatory Law for Railroad Workers*, 36 CORNELL LAW QUARTERLY 203 (1951). Cf. Marcus, *Advocating the Rights of the Injured*, 61 MICHIGAN L. REV. 921, 933-938 (1963).

[33] "Workmen's compensation acts ended enforcement of safety laws through personal injury suits; the compensation remedy for injured employees was exclusive." Brodie, *op. cit. supra* n. 31, at p. 62. P.F.E., unregulated by state utilities commissions (A. 20), is essentially free to ignore railroad safety requirements carrying only minimal penalty or enforcement devices in the absence of personal injury suits.

One of the most significant features of the Employers' Liability Act and its companion statutes is the uniformity achieved through the required application of federal statutory and decisional law exclusively in substantive matters. See *Burnett v. New York Cent. R. Co.*, 380 U.S. 424, 433 (1965), the most recent F.E.L.A. decision of this Court.

ashamedly ask to undermine the protective philosophy of railroad safety and injury law is incredible.

On the few occasions where questions of federal coverage for workers in the railroad industry have reached this Court after 1920, the applicable statute has in every instance been construed liberally and remedially. The result has been that the various elements of the railroad industry have gradually taken their place within this legislative program. Petitioner respectfully submits that the logical step should now be taken of including P.F.E. within the F.E.L.A. through reversal of the judgment of the court below.

Dated, San Francisco, California,
February 26, 1968.

Respectfully submitted,
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SUPREME COURT OF THE UNITED STATES

No. 465.—October Term, 1967.

Elisha Edwards, Petitioner, v. Pacific Fruit Express Company.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[April 8, 1968.]

Mr. Justice Black delivered the opinion of the Court.

The Federal Employers' Liability Act provides that every common carrier by railroad engaged in interstate commerce shall be liable in damages for the injury or death of its employees resulting in whole or in part from the negligence of the railroad or its agents or resulting from defects in its equipment due to its negligence.[1] The question in this case is whether the respondent Pacific Fruit Express Company is a "common carrier by railroad."

The respondent is the largest company of its kind in the United States. It owns, maintains, and leases refrigerator cars to railroads to transport perishable products in commerce. Because it repairs its own cars, it also owns buildings, plants, switching tracks, and equipment to make these repairs. While the railroads to which its cars are leased transport them as directed, the respondent Express Company reserves the right to have the cars diverted to carry out its own business plans. The petitioner Edwards works as an iceman at one of respondent's repair and concentration plants. His duties are to transport ice and help store it in cars for carriage by the railroads. While driving a company motor vehicle in the performance of his duty as an employee for

[1] 35 Stat. 65, as amended, 45 U. S. C. § 51.

respondent, he was thrown violently to the ground, covered with burning gasoline and severely burned. He later brought this action against respondent, charging it was a "common carrier by railroad" and liable for damages under the Federal Employers' Liability Act. Contending that it was not a railroad within the meaning of the Act, respondent company moved for a summary judgment which the District Court granted. The Court of Appeals affirmed, 378 F. 2d 54, and we granted certiorari. —— U. S. ——. We agree with both courts and affirm.

In conducting its business of providing and servicing insulated railroad cars for the carriage of perishable commodities, it is undoubtedly true that respondent performs some railroad functions. For example, it maintains and takes care of railroad cars which are leased to railroads for transportation in interstate commerce. It services these cars while in transit and controls their eventual destination. And respondent has yards and facilities for the repair and storage of its refrigerator cars. The question is whether such functions as these are sufficient to constitute respondent a "common carrier by railroad." For the answer to this question we must look to past judicial decisions interpreting the Federal Employers' Liability Act and also the legislative history surrounding the Act.

This Court has held that the words "common carrier by railroad" mean "one who operates a railroad as a means of carrying for the public—that is to say, a railroad company acting as a common carrier. This view is not only in accord with the ordinary acceptation of the words, but is enforced by the mention of cars, engines, track, roadbed and other property pertaining to a *going railroad. . . .*" *Wells Fargo & Co.* v. *Taylor*, 254 U. S. 175, 187–188. (Emphasis added.) This interpretation of the Act with its references to "operat[ing] a railroad"

and a "going railroad" would indicate that the business of renting refrigerator cars to railroads or shippers and providing protective service in the transportation of perishable commodities is not of itself that of a "common carrier by railroad." And indeed the *Wells Fargo* decision held that express companies were not within the coverage of the Act.[2] In an even earlier case, *Robinson* v. *Baltimore & Ohio R. Co.*, 237 U. S. 84, this Court held that a Pullman car porter was not an employee of a railroad, hence, not within the coverage of the Act. These decisions are based on the rationale that there exist a number of activities and facilities which, while used in conjunction with railroads and closely related to railroading, are yet not railroading itself. In fact, this Court pointed out in the *Robinson* case, in discussing the coverage of the Federal Employers' Liability Act, that, "It was well known that there were on interstate trains persons engaged in various services for other masters. Congress, familiar with this situation, did not use any appropriate expression which could be taken to indicate a purpose to include such persons among those to whom the railroad company was to be liable under the Act." 237 U. S., at 94.

In 1939 Congress substantially amended the Federal Employers' Liability Act. Because of such decisions as *Wells Fargo, supra,* and *Robinson, supra,* one of the proposed amendments[3] would have changed the coverage language of § 1 of the Act to read as follows: "Every common carrier by railroad, including every express company, freight forwarding company, and sleeping-car company, engaged in commerce. . . ." Obviously the amendment was designed to nullify this Court's construction

[2] Express companies were again excluded in the subsequent case of *Jones* v. *New York Cent. R. Co.*, 182 F. 2d 326 (C. A. 6th Cir., 1950), relying on the *Wells Fargo* decision.

[3] Senate bill 1708, 76th Cong., 1st Sess., 1939.

of the Act which had excluded employees of sleeping-car companies and express companies. In committee the amendment received little support and was even opposed by certain segments of organized labor, and it failed to pass.[4] By refusing to broaden the meaning of railroads, Congress declined to extend the coverage of the Act to activities and facilities intimately associated with the business of common carrier by railroad.

Equally significant is the fact that in the years immediately preceding the 1939 amendment to the Federal Employers' Liability Act, Congress had enacted other major labor and social transportation legislation in which refrigerator car companies were expressly included. For example, in the decade of the 1930's Congress passed the following Acts which specifically extend coverage to "any company . . . which operates any equipment or facilities or performs any service . . . in connection with . . . refrigeration or icing . . . of property transported by railroad. . . .": (1) An amendment to the Railway Labor Act, 48 Stat. 1185 (1934), 45 U. S. C. § 151. The Act as originally passed, 44 Stat. 577 (1926), did not specifically include refrigerator car companies. Congress amended it to do so. (2) The Railroad Retirement Act of 1934, 48 Stat. 1283, held unconstitutional in *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330 (1935). (3) The Railroad Retirement Act (1935), 49 Stat. 967 (1935), and (4) The Carriers' Taxing Act, 49 Stat. 974 (1935), both of which were passed to overcome the constitutional objection to the Act of 1934. (5) The Railroad Retirement Act of 1937, 50 Stat. 307, 45 U. S. C. § 228a *et seq.* (1937). (6) The Railroad Retirement Tax Act, 50 Stat. 435 (1937). (7) The Railroad Unemployment Insurance Act, 52 Stat. 1094, 45

[4] Hearings before Subcommittee of the Senate Committee on the Judiciary on Amending the Federal Employers' Liability Act, 76th Cong., 1st Sess., 57, 58 (1939).

U. S. C. § 351 *et seq.* (1938). Yet in 1939, when it came to the amendment of the Federal Employers' Liability Act, Congress made no mention of refrigerator car companies.

In light of this history it is not surprising that there are only four reported cases where suits have been filed alleging that refrigerator car companies like respondent are covered by the Federal Employers' Liability Act—all refusing to hold liability under the Act. The first was *Gaulden* v. *Southern Pacific Co.*, 174 F. 2d 1022 (C. A. 9th Cir., 1949), where suit was brought by an iceman employed by the very refrigerator car company involved here. The Court of Appeals affirmed the District Court's opinion (78 F. Supp. 651) holding that such a refrigerator car company was not a "common carrier by railroad." In a subsequent case the Third Circuit, citing the *Gaulden* opinion, held that another refrigerator car company "which conducted a business similar in all critical aspects to that of" Pacific Fruit Express Company, was not a "common carrier by railroad." *Hetman* v. *Fruit Growers Express Co.*, 346 F. 2d 947 (C. A. 3d Cir. 1965). There have also been two state cases involving this very respondent which denied liability. In both *Aguirre* v. *Southern Pacific Co.*, 232 Cal. App. 2d 636, and *Moleton* v. *Union Pac. R. Co.*, 118 Utah 107, cert. denied, 340 U. S. 932, the courts concluded that respondent was not a "common carrier by railroad."

Thus, for 60 years the Federal Employers' Liability Act has been administered with the understanding that refrigerator car companies are not included within the terms of the Act. During that time injured employees have been taken care of under state compensation laws. In fact the petitioner here has already drawn more than $6,000 under California Compensation Law. The question of whether employees shall rely on state compen-

sation or on the Federal Employers' Liability Act is a pure question of legislative policy, concerning which apparently even the labor organizations most interested have been divided. Under these circumstances we do not think this Court should depart from 60 years of history to do what is a job for Congress.

Affirmed.